

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

185

No. 14,871

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JAN 31 1959

LILA K. MYERS
THIRD - PARTY PLAINTIFF, *Joseph W. Stewart*
Appellant,

v.

**THE FIREMEN'S INSURANCE COMPANY, OF
WASHINGTON, D. C. (A BODY CORPORATE)
THIRD-PARTY DEFENDANT,**

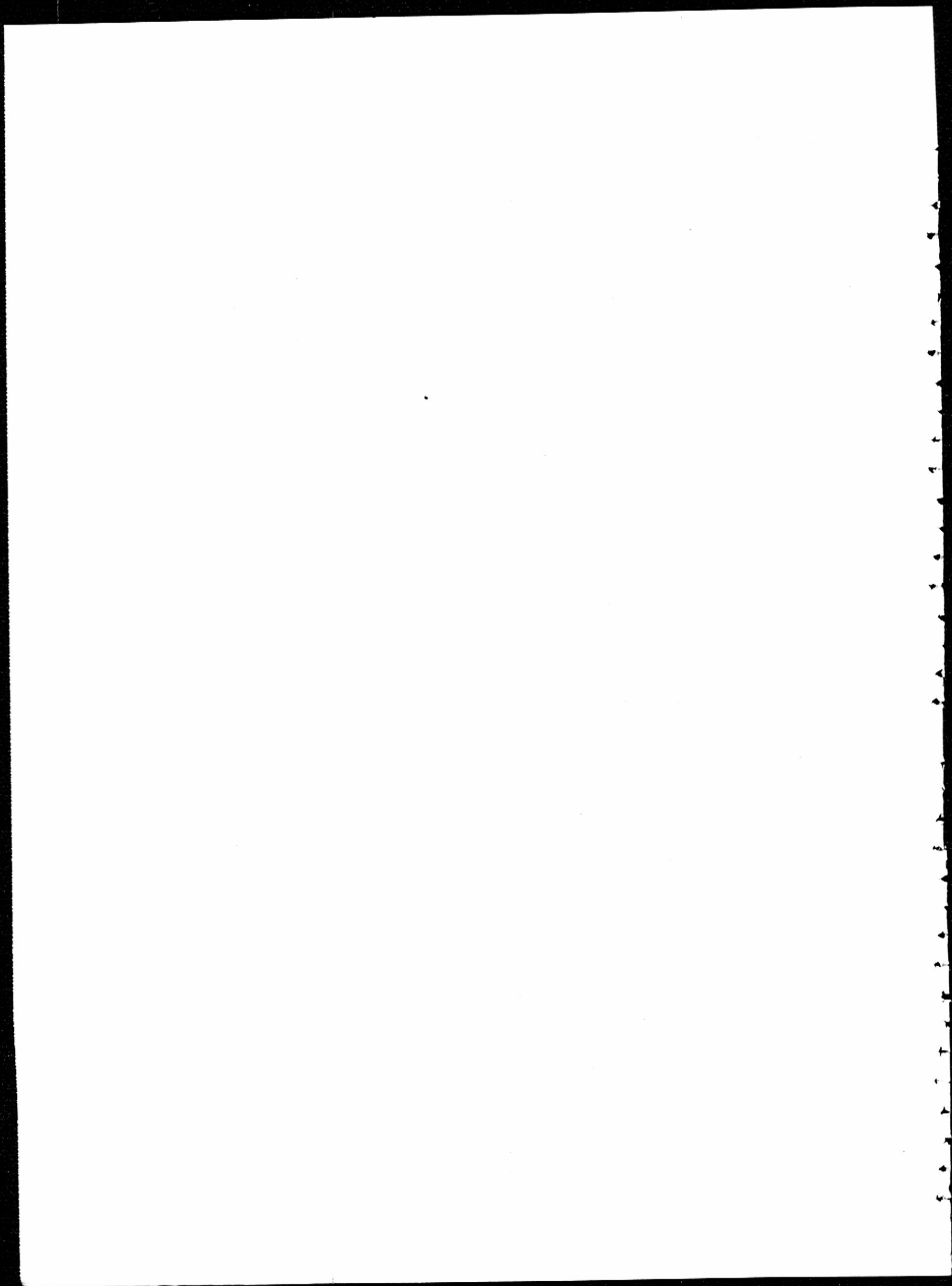
Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LYNN O. COOMBS, ESQ.

**918 F Street, N. W.
Washington, D. C.**

Attorney for Appellant.



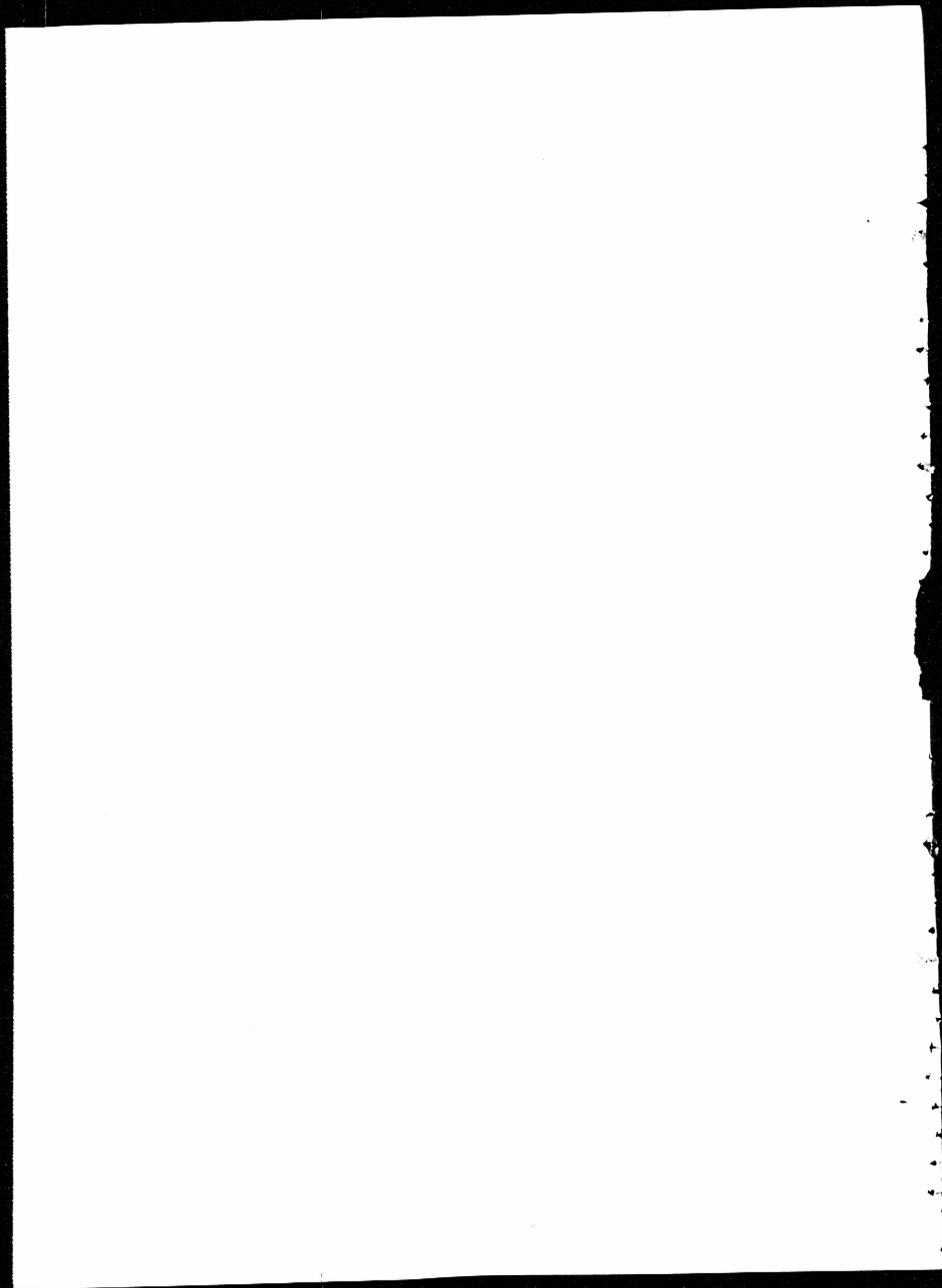
(i)

QUESTIONS PRESENTED ON APPEAL

1. Whether an insured might be owner of a claim against an insurer for reimbursement of expenses incurred in the course of obtaining settlement with a tort-feasor where such settlement was reached before insurer had settled claim under indemnity contract?

Whether such claim raises a genuine issue of fact which precludes an award of summary judgment against claimant?

Whether summary judgment should be granted permitting an insurer to avoid liability where an issue of fact is unsettled?

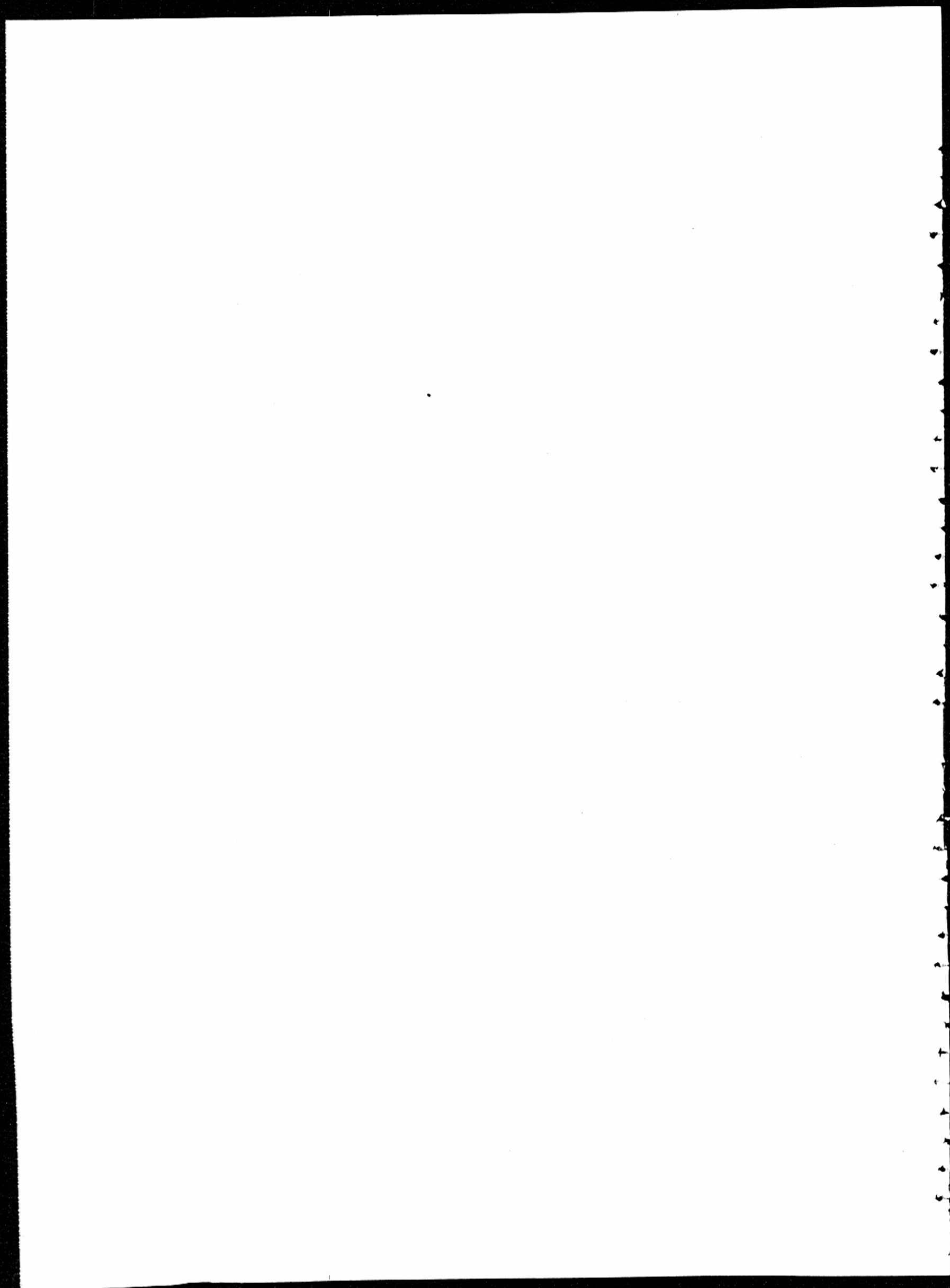


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UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,871

LILA K. MYERS
THIRD - PARTY PLAINTIFF,

Appellant,

v.

THE FIREMEN'S INSURANCE COMPANY, OF
WASHINGTON, D. C. (A BODY CORPORATE)
THIRD-PARTY DEFENDANT,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from the final order of the United States District Court for the District of Columbia, passed October 30, 1958, which granted summary judgment in favor of Firemen's Insurance Company, of Washington, D. C., third-party defendant in proceedings below. Jurisdiction of this Court is invoked under 28 U. S. C. A. 1291 (1952).

STATEMENT OF THE CASE

This action commenced below with a complaint filed by Allied Building Services, Inc. against a home owner, Lila K. Myers, appellant here. This complaint stated a claim in the nature of a mechanic's lien upon appellant's realty for labor and materials supplied to repair appellant's house after damage by fire on or about October 15, 1957. The fire resulted from the negligence of other workmen engaged to renovate furnace installation. Appellant's house was insured by Firemen's Insurance Company of Washington against all damage and loss by fire. Directly after the fire, appellant filed a report and proof of loss statement with the insurer which showed that the negligent party might have been responsible also for all or part of appellant's loss. More than sixty (60) days elapsed and the insurer made no payment whatsoever under its indemnity agreement. Thereafter, as defendant below, appellant answered the suit and impleaded the insurer. Meanwhile, because of the unusual delay, and fearful lest the tort-feasor would be beyond reach, appellant filed suit against the wrongdoer who was responsible for the fire. This suit proceeded to settlement with said wrongdoer without the express consent but with the knowledge of the insurer, appellee here; whereupon the insurer obtained from the wrongdoer a copy of the insured's release and filed the same with a motion for summary judgment herein.

In the course of pleading and in oral argument below, appellant disputed insurer's plea to avoid liability and raised several issues which seemed to be genuine issues of material fact, included among which were appellant's claims that (a), insurer was estopped from asserting the right to subrogation, and (b) insured was entitled to reimbursement for expenses incurred in obtaining settlement with the wrongdoer. Appellant asserted that without such reimbursement there would be no complete indemnity under the contract of insurance. In spite of the conflicting view and inferences advanced therefrom, and

without testimony, the Motions Court entered an order granting the insurer summary judgment. This appeal ensued.

RULE INVOLVED

Rule 56, The Federal Rules of Civil Procedure, 28
U. S. C. A.

POINTS RELIED UPON BY APPELLANT

I. Disputed questions of liability under an indemnity contract are questions of fact which require hearing upon the merits between the parties.

II. Insurer, in the proceeding below, did not meet the requirement to have summary judgment.

III. Summary judgment may not be entered where Court must choose between conflicting possible inferences from the matter presented.

SUMMARY OF ARGUMENT

There were genuine and material issues raised in this case which ought not be disposed of without trial upon the facts and the law. As long as there exists the possibility of a finding for either party on the ultimate fact, the moving party is not entitled to summary judgment.

ARGUMENT

Appellant seeks review upon the simple question: should summary judgment be resorted to as a means of disposing of litigation where there is any doubt as to the facts or the legal inferences from the facts? This is the core of controversy.

Appellant believes that there were material issues raised in the pleading and in oral argument had heretofore which revealed disputed facts and which raised contrary inferences of law.

I.

ON SUMMARY JUDGMENT, DISPUTED QUESTIONS OF LIABILITY UNDER AN INDEMNITY CONTRACT ARE QUESTIONS OF FACT WHICH REQUIRE HEARING UPON THE MERITS BETWEEN THE PARTIES.

This appellant, after extensive search, has not been able to find any stated norm as to what constitutes an issue of fact under Rule 56 of the Rules of Federal Civil Procedure. Any test for such facts must rest, it seems, in the matters peculiar to a particular case. In this particular case, the following things written and said (J. A. 4-17, 23-30) were raised as material issues involved and to be settled, to wit: (a) did the insurer make, at any time, a tender sufficient in law to be effective as tender of settlement to the insured; (b) did the insurer give assent to the insured's suit and settlement with the tort-feasor herein; (c) are there any circumstances under which an insured may have a valid claim against an insurer for expenses incurred in reaching

settlement with a tort-feasor who is also liable to the insured; (d) are there any circumstances under which an insurer, by conduct or otherwise, might waive, or be estopped to assert the right to subrogation with regard to its insured; (e) are circumstances of this kind present in this particular case; (f) would such circumstances, if present, have any bearing upon the determination as to whether an insurer is bound to indemnify an insured where such insured settles first with a tort-feasor. To this appellant these issues are neither frivolous nor sham; they are disputed; and, generally disputed facts are not settled upon the statements of counsel nor upon mere presentation of documents. To allow such disposition of litigation would be to deny, in the present case, appellant's right to have his claim equitably considered.

See Powers v. Calvert Fire Ins. Co., 216 SC 309, 57 S.E. (2) 638; Anno. 16 ALR (2) 1261; Weber v. United H & I Mutuals Co., 75 ND5581, 31 NW (2) 456; Alexandria Restaurant v. New Hampshire Ins. Co. of Manchester, 71 NYS (2) 515, 272 App. Div. 346; Prospeck v. Farmer and Mechanics Ins. Assn. (Texas Civil Appeals) 65 S.W. (2) 390.

II.

INSURER, IN THE PROCEEDING BELOW, DID NOT MEET
THE REQUIREMENT TO HAVE SUMMARY JUDGMENT.
(J.A. 23-30)

In cases too numerous to mention, it has been held that the proceeding upon a motion for summary judgment is an inquiry to determine whether or not there is an issue of material fact unsettled between the parties. The test of what is expected of a party in order to prevail upon a motion for summary judgment is not left to doubt; party seeking summary judgment should demonstrate the right to such judgment with

¹ Caylor v. Virden, 20 Fed. Rules Serv. 56.41 Case 14, 217 F (2) 739; Traylor v. Black, Swalls & Bryson, Inc. 15 Fed. Rules Serv. 56 c.41, Case 10, 189 F (2) 213; Sarkes Tarzian, Inc. v. United States, 23 Fed. Rules Serv. 56c.43 Case 1, 240 F (2) 467 (1957); Hunter v. Mitchell, 13 Fed. Rules Serv. 56c.41, Case 8, 86 App. D. C. 121.

such clarity as to leave no room for controversy and show that the other party is not entitled to recover under any discernible circumstance.²

Appellant contends that an insurer's right to subrogation is not absolute; neither should an insurer be allowed to profit by inaction or escape liability by reason of insured's effort to save himself harmless.³ In exhibiting the appellant's release to the tort-feasor responsible for appellant's loss, the insurer did not relieve itself of the responsibility to show good faith, the absence of collusion or any other facts which would bar the operation of law in his favor. Appellant submits that insurer-respondent failed to meet the test of showing that appellant would not be entitled to recover under "any discernible circumstance", or that of showing "clearly what the truth is".⁴

III.

SUMMARY JUDGMENT MAY NOT BE ENTERED WHERE COURT MUST CHOOSE BETWEEN CONFLICTING POSSIBLE INFERENCES FROM THE MATTER PRESENTED.

In hearing motion for summary judgment, the Court does not exercise the function of deciding issues of fact. It has been laid down that "if a finding on the ultimate fact for either party is possible, the moving party is not entitled to summary judgment as a matter of law."⁵

Appellant contends that facts which were in dispute were disregarded in the Court below. The legal inferences to be drawn from these conflicting matters should have been left for trial. It is possible that a reasonably prudent man could have concluded for either party.

² Brewer v. Socony Vac. Oil Co., 15 Fed. Rules Serv. 56c.41, Case 11; Evers v. Buxbaum, U.S. App. D.C. March 6, 1958; 25 Fed. Rules Serv. 56c.41, Case 6, 253 F (2) 356; Sartor v. Arkansas Gas Corp. 321 U.S. 620 (1944).

³ Powers v. Calvert Insurance Co., op. cit.

⁴ Evers v. Buxbaum op. cit.; Brewer v. Socony Vac. Oil, op. cit.

⁵ Sarkes v. United States, 240 F (2) 467 (1957).

So long as this could be done, the Court was faced with a choice between conflicting issues without evidentiary guides. This certainly vitiates the justice of a cause. While this disposition may help clear a crowded calendar, appellant suggests it is not proper alternative for trial on the facts and the law.

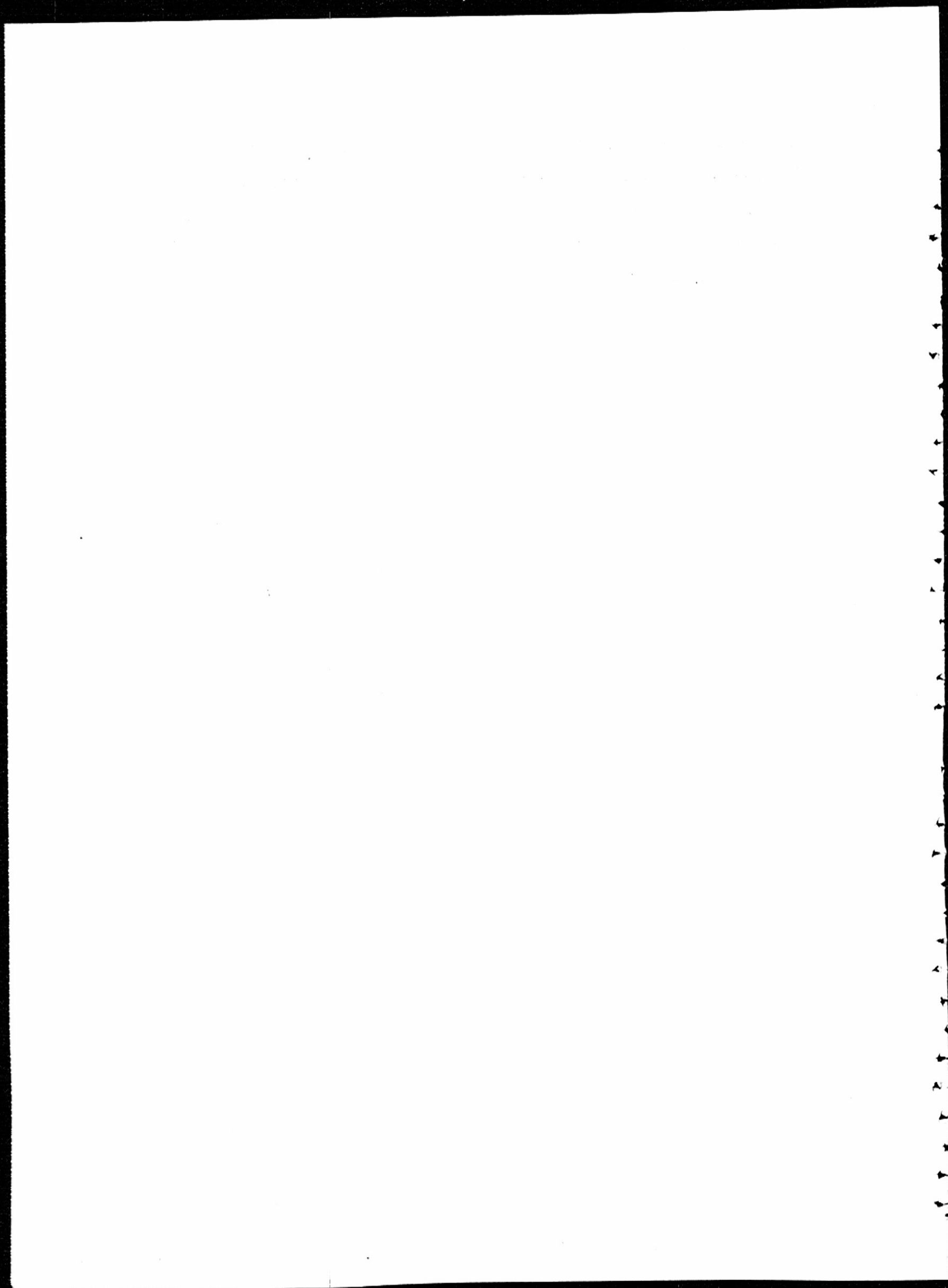
CONCLUSION

WHEREFORE, it is respectfully submitted that the Order of the District Court be vacated.

LYNN O. COOMBS

918 F Street, N. W.
Washington, D. C.

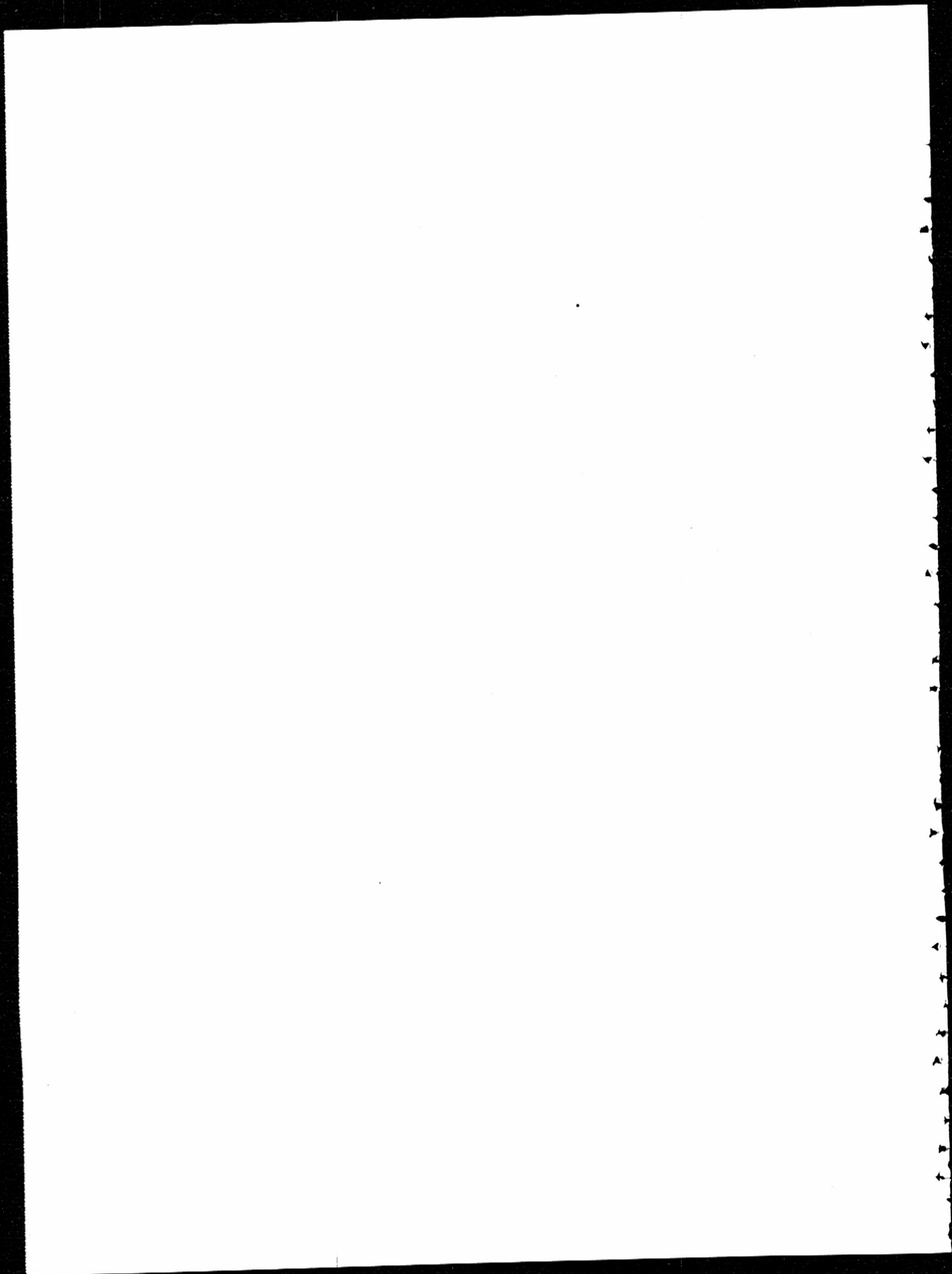
Attorney for Appellant.



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JOINT APPENDIXUNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIAALLIED BUILDING SERVICES, INC. :
P. O. Box 8604 :
Brightwood Station :
Washington, D. C. :

Plaintiffs, :

v. :

Civil Action No. 1076-'58

LILA K. MYERS :
3359 Clay Place, N. E. :
Washington, D. C. :

Defendant. :

DOCKET ENTRIES

<u>Date</u>	<u>Proceedings</u>
1958	Deposit for cost by
Apr. 25	Complaint, appearance filed
Apr. 25	Summons, copies (1) and copies (1) of Complaint issued ser. 4-29-58
May 19	Stipulations for extension of time for deft. to answer etc. to 5-23-58; App. Lynn O. Coombs, atty. for deft. filed
May 20	Motion of deft. to bring in third-party deft. Exhibits (2) filed
May 21	Order granting leave to deft. to make The Firemen's Insurance Co., of Washington, D.C. 3rd party deft. Morris, J. (N)
May 22	Answer of deft. to complaint c/m 5-22-58 filed
May 22	Third party complaint
May 22	Summons copy (1) & copy (1) of third party complaint & complaint Served 5-26-58
June 6	Answer of third-party complaint c/m 6-4-58 App. Mercier, Sanders & Baker filed
June 6	Calendared (N)

<u>Date</u>	<u>Proceedings</u>
1958	
July 22	Opposition of deft. #1 to motion of third party deft. for summary judgment P&A c/m 7-18-58 filed
July 24	Motion of 3rd party deft. for summary judgment vs. deft. P&A, Notice, c/m 7-11-58 M.C. 7-24-58 Exhibit filed
Sept. 25	Motion for summary judgment continued to Oct. 27, 1958 consent of defts. filed
Oct. 7	Additional P&A of 3rd party deft. in support of motion for summary judgment; exhibits filed
Oct. 30	Order granting summary judgment for 3rd party deft. vs. 3rd party plttf; dismissing 3rd party complaint with costs. Pine, J. (N)
Nov. 12	Notice of Appeal of deft. #1, Third party plttf., copy mailed to Walter M. King Esq, 504 Southern Bldg. & Mercier, Sanders, Baker & Schnabel, 613 15th St., N.W. Dep. \$5.00 by Lynn O. Coombs. filed
Nov. 19	Called and passed for settlement McGuire, J.

[Filed April 25, 1958]

COMPLAINT TO ENFORCE MECHANICS LIEN

1. This Court has jurisdiction in this cause in that it involves title to real estate.

2. On October 22, 1957, the plaintiff, Allied Building Services, Inc., entered into a contract with the defendant, Lila K. Myers, whereby the plaintiff agreed to make certain repairs caused by fire damage on Lot 108, Square 5002, and the improvements thereon, owned by the defendant, Lila K. Myers.

3. On or about October 28, 1957, the plaintiff, Allied Building Services, Inc., entered into a supplementary contract with the defendant to make additional repairs and improvements to said premises.

4. On or about November 21, 1957, the repairs and improvements to the said premises were completed by the plaintiff and accepted by the defendant. The defendant was billed for the agreed value of said work and cost of said materials in the amount of \$991.50, but no part of the \$991.50 due from her has been paid, although repeated demands have been made therefor.

5. As of October 22, 1957, Title of Record to said Lot 108, Square 5002, was vested in the defendant, Lila K. Myers, subject to an encumbrance thereon.

6. The defendant has enjoyed the benefits of the work and labor performed by the plaintiff and there remains due and payable to the plaintiff the sum of \$991.50.

7. The plaintiff, on January 24, 1958, caused to be filed with the Clerk of this Court a Notice of Intention to Hold Mechanics Lien upon said premises, which notice is numbered 18-58, a copy of which is attached hereto as plaintiff's exhibit A.

8. The plaintiff, after search of the Lien Docket, knows of no other outstanding Notice of Intention to Hold Mechanics Lien on Lot 108 in Square 5002.

WHEREFORE, the plaintiff prays for judgment:

1. To establish the plaintiff's lien on the aforesaid property to the extent of the sum of \$991.50 with interest thereon from November 21, 1957.

2. That the defendant, Lila K. Myers, be required to pay said \$991.50 with interest thereon from November 21, 1957.

3. That in default thereof, that the said land and premises be sold to enforce the lien and the proceeds of sale applied to satisfy the lien and that a trustee or trustees be appointed for the purpose of said sale.

4. And for such other and further relief as to the Court may seem just and proper.

/s/ Walter M. King, Jr.

* * *

Attorney for Plaintiff

[Filed May 21, 1958]

ORDER
BRINGING IN THIRD-PARTY DEFENDANT

This matter having come on upon the defendant's motion, ex parte, for leave to make The Firemen's Insurance Company, of Washington, D.C., a party to this action in accordance with the form of summons and third-party complaint annexed to said motion, and good cause appearing, it is, this 21st day of May, 1958,

ORDERED,

- I. That leave is hereby given to the defendant to make The Firemen's Insurance Company, of Washington, D.C., a party to this action in accordance with the said form of summons and third-party complaint; and
- II. That the Clerk of this Court shall issue the said summons under the seal of this Court, and shall cause the said summons and third-party complaint to be served upon the said third-party defendant.

/s/ James W. Morris
United States District Judge

[Filed May 22, 1958]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIAALLIED BUILDING SERVICES, INC.)
(A Body Corporate))
P.O. Box 8604, Brightwood Station)
Washington, D. C.)

Plaintiff)

vs.)

LILA K. MYERS)
3359 Clay Place, Northeast)
Washington, D. C.)Defendant and)
Third-Party Plaintiff)

vs.)

The FIREMEN'S INSURANCE CO., OF)
WASHINGTON, D. C. (A Body Corporate))
303 Seventh Street, N. W.)
Washington, D. C.)

Third-Party Defendant)

Civil Action No. 1076-58

THIRD-PARTY COMPLAINT
FOR RECOVERY ON FIRE POLICY

Defendant and Third-party Plaintiff, by and through attorney, complains of the Third-party Defendant, and for grounds therefor, states as follows:

1. Jurisdiction of the Court is invoked by reason of the residence of the parties, the nature of the controversy, as well as the nature of the original suit, involving title to real property.

2. Third-party Defendant is a fire insurance company, licensed and authorized to do business in the District of Columbia and at all times mentioned herein has been, and still is, engaged in the fire insurance business in the said District.

3. Plaintiff, Allied Building Services, Inc., has hereinbefore filed suit against the Defendant and Third-party Plaintiff, Lila K. Myers, claiming a lien in the amount of Nine Hundred and Ninety-one Dollars and

fifty cents (\$991.50) for work alleged to have been performed on buildings constructed on the premises owned by the said Defendant and Third-party Plaintiff.

4. Prior to the first day of September, 1957, Third-party Defendant, for and in consideration of a valuable premium paid and agreed to be paid by the Third-party Plaintiff, issued to said third-party Plaintiff, Lila K. Myers, its policy of insurance, numbered 11000/30119 covering any loss from fire to said party's dwelling house and buildings known as the premises at 3359 Clay Place, N. E., situated in the District of Columbia.

5. Thereafter, on or about the 15th day of October, 1957, while the said policy of insurance was in full force and effect, Third-party Plaintiff's dwelling house and buildings were damaged and destroyed by fire.

6. Within due time thereafter, as prescribed in said policy, Third-party Plaintiff notified Third-party Defendant of such fire loss and damage and the surrounding circumstances; also, within the time prescribed, Third-party Plaintiff made and filed with the fire insurance company a sworn proof of loss statement indicating damage evaluated by a bonded fire adjustor in the amount of \$1,112.50, which statement was accepted without objection.

7. Although Third-party Plaintiff has duly performed each and every condition on her part required by the terms of the policy herein, Third-party Defendant, without excuse or justification, has failed, refused and wholly neglected to pay any part of the amount due upon the claim. As a result, Third-party Plaintiff has sustained a loss far in excess of the damage from said fire. Therefore, Third-party Plaintiff demands indemnity in the amount of the actual loss as well as damages accruing from insurer's negligent failure to service this claim, and the expenses and disbursements of this suit. To recover all such damage, Third-party Plaintiff seeks recompense in the amount of Four Thousand, Five Hundred Dollars (\$4,500.00).

WHEREFORE, Third-party Plaintiff demands judgment against the Third-party Defendant in the amount of \$4,500.00 and costs with interest from the date of this suit.

/s/ Lynn O. Coombs

Attorney for Defendant and Third-party Plaintiff

* * *

[Filed June 6, 1958]

ANSWER OF THIRD-PARTY DEFENDANT,
THE FIREMEN'S INSURANCE CO. OF WASHINGTON, D.C.

First Defense

The third-party complaint fails to state a cause of action against the third-party defendant.

Second Defense

Answering the complaint, paragraph by paragraph, the third-party defendant.

1. Admits the jurisdiction of this Court;
2. Admits that it is a fire insurance company authorized and licensed to do business in the District of Columbia and engaged in the fire insurance business in said District;
3. Has no knowledge as to allegations of Paragraph 3;
4. Admits the fire insurance coverage described in Paragraph 4;
5. Denies the allegations of Paragraph 5 of the complaint but, upon information and belief, states that it believes the third-party plaintiff's house was damaged by fire;
6. Admits notice of the fire and the filing of a proof of loss in support of the fire loss claim in the amount of \$1,112.50;
7. Denies the allegations of Paragraph 7 of the third-party complaint.

Third Defense

There was no compliance with the terms of the policy:

1. The third-party defendant states that the third-party plaintiff is not entitled to recover in this cause against this third-party defendant because the third-party plaintiff failed to comply with the terms of the contract of fire insurance in force and effect in this case because the third-party plaintiff refused to sign a subrogation receipt in accordance with the terms of the policy when the agreed settlement of \$1,112.50 was tendered to the third-party plaintiff.

Fourth Defense

1. Tender of agreed settlement to the third-party plaintiff - The third-party defendant tenders herewith to the third-party plaintiff the agreed sum of \$1,112.50 as the sum agreed upon by the third-party plaintiff in full settlement of its claim under the fire loss sued upon in this third-party complaint upon the delivery to this third-party defendant of the subrogation receipt usual in the settlement of insurance company claims.

2. This third-party defendant consents to the entry of a judgment against it for the amount of \$1,112.50 upon the entry of an Order of this Court requiring the third-party plaintiff to assign and subrogate the claim sued upon hereunder.

Fifth Defense

1. The third-party defendant denies each and every allegation of the third-party complaint not specifically admitted.

WHEREFORE, the third-party defendant demands

(a) That the Court dismiss this third-party complaint upon the payment of the sum of \$1,112.50 to the third-party plaintiff; and

(b) Upon the assignment and delivery of the third-party defendant of the third-party plaintiff's claim arising out of the fire upon which this suit is based; and

(c) That costs in this proceeding be assessed against the third-party plaintiff.

MERCIER, SANDERS AND BAKER

By /s/ N. Meyer Baker
Attorneys for Third-Party Defendant

* * * * *

[Certificate of Mailing]

**COMPLAINT
DAMAGES FOR BREACH OF WARRANTY AND FOR
NEGLIGENCE IN REPAIRING HEATING EQUIPMENT**

Plaintiffs, by and through attorney, complain of the defendant and for grounds therefor, state as follows:

1. Jurisdiction of this Court is invoked by reason of the residence of the parties and the amount in controversy between them, the same being in excess of \$3,000.00.
2. Defendant, The Brookland Company, was, and still is, a business entity, present in and doing business in the District of Columbia, the nature of which business is the sale and installation of oil burners and furnaces for dwelling houses, sale and delivery of fuel oil, sale and servicing of parts for installations, and the general repair and maintenance of household heating plants.
3. Defendant, in overtures for business, holds out to the general public that its agents, servants and employees are expert and competent in the performance of repair work and maintenance service undertaken, and warrants that such work will be done correctly and safely.
4. Plaintiffs are owners of the dwelling house and buildings located on the premises known as No. 3359 Clay Place, Northeast, the same being further identified in the real property records of the District of Columbia as Lot 108, in Square 5002, and improvements.
5. On or about the 12th day of October, 1957, plaintiffs called upon the defendant to clean, repair and service the oil burner in the heating plant on their premises, requesting the defendant to put said heating unit in proper condition for daily use. At the same time, plaintiff ordered a quantity of fuel oil to be delivered to start up the furnace for the season. In response, defendant dispatched its servants and/or agents to make the repairs and adjustments necessary to place the furnace herein in proper mechanical working condition. Then and there, it became, and it was, the duty of the defendant, its servants and/or its agents to do the work competently, so as to cause neither danger nor hazard to person or property of those occupying plaintiff's house;

and it was their duty to comply with the regulations of the District of Columbia Building Code in carrying out their work, and to warn the plaintiffs of any defect in the installation.

6. But, in dereliction of these duties, defendant, by and through the acts of it's servants and/or agents in the course of the work undertaken, did negligently and wantonly fail to correct the imperfect condition of plaintiff's oil burner, failed to observe the regulations of the Building Code of the District of Columbia, and failed to warn the plaintiffs of the danger of improper insulation, of which danger defendant, his servants or agents, knew or should have known.

7. As a direct and proximate result of the negligent acts of the defendant, it's servants and agents, and each of them, the dwelling house of the plaintiffs did, on October 15, 1957, catch fire while defendant's agent was engaged in repairing the furnace aforesaid on the plaintiff's premises. Defendant's agent made no attempt to prevent spread of the fire, but left the premises without giving aid to plaintiff's children who were alone on the premises. In consequence, part of plaintiff's dwelling burned to the ground together with the greater part of their furniture, furnishings and personal belongings located therein, and surrounding shrubbery and plants, causing plaintiffs to be without a home in which to live, all to the damage of the plaintiffs.

8. The defendant warranted to the plaintiffs that the repair and adjustment of the oil burner herein would render it suitable and reasonably fit for the use intended; defendant well knew the purpose for which the oil burner was to be used. This warranty was breached by the defendant in that said oil burner was not properly repaired so as to be suitable and reasonably fit for the use intended and as a result malfunctioned, causing a fire as aforesaid.

9. At all times alleged herein, the furnace and oil burner of the plaintiffs was under the control and care of the defendant, it's servants or agents, exclusively.

10. The plaintiffs were put to great expense by reason of the damage caused by defendant's negligence, and seek by this action to

recover the same in the amount and sum of Four Thousand Dollars (\$4,000.00) actual damage and an equal amount punitive damage, \$4,000.00, or a total of Eight Thousand Dollars (\$8,000.00).

WHEREFORE, plaintiffs demand judgment against the defendant in the sum of Eight Thousand Dollars (\$8,000.00) plus costs and interest from the date of this suit.

/s/ Lynn O. Coombs
Attorney for Plaintiffs
* * *

[Filed July 24, 1958]

RELEASE IN FULL

KNOW ALL MEN BY THESE PRESENTS, That We, Samuel L. Myers and Lila K. Myers, 3359 Clay Place, N. E., Washington, D. C., for the sole consideration of Two Thousand Six Hundred and Twelve and 32/100 dollars, to us in hand paid by Lee F. Ruggless have released and discharged, and by these presents do for our heirs, executors, administrators and assigns, release and forever discharge the said Lee F. Ruggless and all other persons, firms or corporations from all claims, demands, damages, actions, or causes of action, on account of damage to property, bodily injuries or death, resulting, or to result, from an accident to our property and persons which occurred on or about the 15th day of October 1957, by reason of fire at the premises known as 3359 Clay Place, N. E., Washington, D. C., and of and for all claims or demands whatsoever in law or in equity, which we, our heirs, executors, administrators, or assigns can, shall or may have by reason of any matter, cause or thing whatsoever prior to the date hereof.

IT IS UNDERSTOOD AND AGREED THAT this is a full and final release of all claims of every nature and kind whatsoever, and releases claims that are known and unknown, suspected and unsuspected.

IN WITNESS THEREOF, we have hereunto set our hands and seals this 7th day of June, 1958.

In the presence of

/s/ Lynn O. Coombs
918 F St., N. W.
Washington, D. C.
/s/ Raymond J. Valentine
127 Harrison St.
Petersburg, Va.

Samuel L. Myers (Seal)
3359 Clay Place, N. E. (Street)
Washington, D. C. Town-State
Lila K. Myers (Seal)
3359 Clay Place, N. E. (Street)
Washington, D. C. Town-State

[Filed July 24, 1958]

**MOTION OF THIRD-PARTY DEFENDANT
FOR SUMMARY JUDGMENT AGAINST THE DEFENDANT**

Now comes the Third-Party Defendant, The Firemen's Insurance Co. of Washington, D. C., through its attorneys of record and moves this honorable Court to grant the summary judgment against the defendant and third-party plaintiff, Lila K. Myers, and for reasons states that there is no genuine issue of any material fact and, as a matter of law, the third-party defendant is entitled to judgment.

MERCIER, SANDERS, BAKER AND
SCHNABEL

By /s/ N. Meyer Baker
Attorneys for Third-Party Defendant
* * *

NOTICE

- TO: 1. Lynn O. Coombs
Attorney for Lila K. Myers,
Third-Party Defendant
918 F Street, N. W.
Washington, D. C.
and
2. Walter M. King, Jr.
Attorney for the Plaintiff
Allied Building Services, Inc.
504 Southern Building
Washington 5, D. C.

Rules of Court require that you file any objection to the granting of the above entitled motion within 5 days after you have received a copy of it.

**POINTS AND AUTHORITIES
IN SUPPORT OF MOTION**

1. The Third-Party Plaintiff has asserted a claim against the Third-Party Defendant arising out of a fire which was covered by a fire insurance policy issued by the Third-Party defendant to the Third-Party Plaintiff. The fire occurred on October 15, 1957, at 3359 Clay Place, N. E., Washington, D. C. and was caused by the negligence of a third party, Lee F. Ruggless.

2. The said Lee F. Ruggless has settled this claim with the Third-Party Plaintiff for the sum of \$2, 612. 32 as shown by photostatic copy of the Release executed and delivered to the said Ruggless or his agents, by the said Lila K. Myers, Third-Party Plaintiff. A photostatic copy of said release is hereto attached and incorporated herein by reference.

3. The fire insurance policy issued to the Third-Party Plaintiff by the Third-Party Defendant is a contract of indemnity. Since the Third-Party Plaintiff has been fully reimbursed for her said fire loss, she, the Third-Party Plaintiff, is not entitled to recover against the Third-Party Defendant.

- (a) "Fundamentally, it (a contract of insurance) is an agreement to pay a sum on the happening of an event, and has been said to be best defined as a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event."

44 C. J. S., p. 471 and the cases
cited thereunder Note 5

- (b) "As a general matter, the essential feature of policies of insurance at the present time is substantially that of indemnity to the insured".

29 Am. Jur., p. 47, Note 5 and
cases cited thereunder

- (c) See also 29 Am. Jur., Para. 1344, p. 1005 which holds in substance that where an insured recovers from a wrongdoer for a loss caused by the wrongdoer, the insured thereby defeats the right of subrogation of his insurance company and cannot again recover from his insurance company under his policy with it.
- (d) "Indemnity against loss is the essence of a contract of insurance."

Newark F. Ins. Co. vs. Turk
6 Fed. (2nd) 533, 43 A. L. R. 498

4. The Third-Party Plaintiff has asserted a cause of action for which no relief can be granted by this Court.
5. In view of the foregoing, the Third-Party Plaintiff's claim against the Third-Party Defendant should be dismissed.

MERCIER, SANDERS, BAKER AND
SCHNABEL

By /s/ N. Meyer Baker
Attorneys for Third-Party Defendant
The Firemen's Insurance Co. of
Washington, D. C.

* * * *

[Certificate of Mailing]

[Filed July 22, 1958]

**OPPOSITION TO THIRD-PARTY
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Comes now the Third-Party Plaintiff, and, in opposition to Third-Party Defendant's Motion for Summary Judgment on file herein, states that the party-movant is not entitled to the relief requested for the following reasons:

I. There are genuine issues of material fact presented to the Court, the adjudication of which requires a hearing upon the merits to wit:

(a) That Third-Party Defendant neither aided nor participated in the prosecution of Third-Party Plaintiff's claim against the tort-feasor; in this posture, Third-Party Defendant may not be unjustly enriched by reimbursement or exoneration;

(b) That party-movant, by virtue of arbitrary, inequitable and vexatious conduct, is culpable; said party's course has been marked by bad faith;

(c) That, by reason of laches, misconduct and breach of obligation to pay on Third-Party Plaintiff's contract of insurance, Third-Party Defendant has waived all right of subrogation, reimbursement or exoneration;

(d) That Third-Party Plaintiff has incurred expenses and costs in obtaining a settlement with tort-feasor. Third-Party Plaintiff lays claim to all said sums disbursed and the allowance of attorney's fees in this action against Third-Party Defendant;

II. Third-Party Defendant's memorandum of law and exhibit, lacking complete authenticity, are insufficient to establish the absence of material issues of fact in this case.

III. Upon the motion presented herein, all doubts are to be resolved in opposing party's favor; and summary judgment is allowed only where there are no issues of material fact.

For these and such other reasons as may appear or be shown upon the hearing hereof, Third-Party Plaintiff prays that Third-Party Defendant take nothing by reason of his motion and that the same be hence dismissed.

/s/ Lynn O. Coombs,
Attorney for Defendant and
Third-Party Plaintiff

* * *

POINTS AND AUTHORITIES

1. The Rules of Federal Civil Procedure, Rule 56, 28USCA
2. The record herein
3. Affidavit of Third-Party Plaintiff
4. An Insurer may be estopped from asserting any claim for

reimbursement or exoneration where, by laches, misconduct, or other breach he is deemed to have waived his rights

Powers v. Calvert Fire Ins. Co., 57 S. E. (2)638; Anno. 16 ALR (2) 1260

Weber v. United Hardware Implement Mutals Co., 31NW(2) 456, 75 N. D. 581

Firemen's Fund Ins. Co. v. Thomas, 49 Ga. App. 731, 176 S. E. 690

Swain v. Seamen's 9 Wall 254, 19 Law ed. 554

Cf. 8 Couch, Cyclopedia of Insurance Law 6674, 6936

5. Damages to which insured is entitled under policy cannot be diminished because he has collateral contracts or relations with third persons which relieve him wholly or partly against loss for which insurer agreed to indemnify him.

Alexandra Restaurant v. New Hampshire Ins., Co., 71 NYS(2) 515, Affirmed, Rehearing denied 272 App. Div. 346

6. On motion for summary judgment, Court will not decide issues of fact but only decide if there are such issues to be tried, all doubts being resolved in favor of opposing party; and, no summary judgment where there are issues of material fact.

Lane v. Greyhound Bus Corp., 17 Fed. Rules Serv. 56c41, Case 18, 13 F. R. D. 178

Kansas City Power & Light Co. v. Chapman, 16 F. Rules Serv. 56c41, Case 14, 12 F. R. D. 408 (1952, D. C.)

Cf. generally, 6 Appelman, Insurance Law & Prac. 4051ff.
16 Appelman, Opp. c. t. Sec. 9088
May, on Insurance, 754

[Certificate of Mailing]

[Filed October 7, 1958]

**ADDITIONAL POINTS AND AUTHORITIES
IN SUPPORT OF THIRD-PARTY DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT AGAINST
THE DEFENDANTS**

1. The fire insurance policy issued by the third-party defendant contains the usual subrogation provision, which is as follows:

"162 Subrogation. THIS COMPANY MAY REQUIRE FROM THE INSURED AN ASSIGNMENT OF ALL RIGHT OF RECOVERY AGAINST ANY PARTY FOR LOSS TO THE EXTENT THAT PAYMENT THEREFOR IS MADE BY THIS COMPANY."

2. A duplicate copy of said policy is hereto attached and by reference incorporated herein.

**MERCIER, SANDERS, BAKER &
SCHNABEL**

By /s/ N. Meyer Baker
Attorneys for Third-Party Defendant
* * * *

[Certificate of Mailing]

SAMPLE
10/10/58 3:19PM

10/10/58 3:19PM

Standard Fire Insurance Policy for Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

No. 11000/30119

17683

RENEWAL OF NUMBER

THE PRESIDENT AND DIRECTORS OF THE

A STOCK COMPANY



OF WASHINGTON AND GEORGETOWN

IN THE DISTRICT OF COLUMBIA

INSURANCE IS PROVIDED AGAINST ONLY THOSE PERILS AND FOR ONLY THOSE COVERAGES INDICATED BELOW BY A PREMIUM CHARGE AND AGAINST OTHER PERILS AND FOR OTHER COVERAGES ONLY WHEN ENDORSED HEREON OR ADDED HERETO.

PERIL(S) Insured Against and Coverage(s) Provided (Insert Name of Each)

PERIL(S) Insured Against and Coverage(s) Provided (Insert Name of Each)	AMOUNT	RATE	PREMIUM
FIRE AND LIGHTNING	\$5,500.00	\$.08x2 1/2	\$11.00
EXTENDED COVERAGE X X X X X X X X X X X X X X X X		\$.05x2 1/2	\$ 6.88

		\$	\$
		\$	\$
		\$	\$

TOTAL PREMIUM \$17.88

IN CONSIDERATION OF THE PROVISIONS AND STIPULATIONS HEREIN OR ADDED HERETO

AND OF the premium above specified, this Company, for the term of THREE YEARS from

OCTOBER 13, 1955 At Noon (Standard Time) to OCTOBER 3, 1958 At Noon (Standard Time)

at location of property involved, to an amount not exceeding the amount(s) above specified does insure

LILA K. MYERS

and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality with a reasonable time after the loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or regulation governing reconstruction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY EXCEPT AS HEREINAFTER PROVIDED, to the property described hereinafter while located or contained as described in this policy, at a rate of five cents per square foot per annum for the first year of each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy.

1 Item No.	2 Amount Fire or Fire and Extended Coverage, or Other Peril	3 Per Cent of Co-Insurance Applicable	4 Amount Other Peril if Different Than Fire	5 Per Cent of Co-Insurance Applicable	6 DESCRIPTION AND LOCATION OF PROPERTY COVERED Show construction, type of roof and occupancy of building(s) covered or containing the property covered. If occupied as a dwelling state No. of families.
1	\$5,500.00				ON THE BRICK, PRIVATE DWELLING, SITUATE ON LOT 100, SQUARE 5002, REAR, NORTHEAST, WASHINGTON, D. C.

Subject to Form No(s). 250-6/56

(INSERT FORM NUMBER(S) AND EDITION DATE(S))

attached hereto

Mortgage Clause: Subject to the provisions of the mortgage clause attached hereto, loss, if any, on building items, shall be payable to: PERPETUAL BUILDING ASSOCIATION, AS FIRST MORTGAGEE (OR TRUSTEE)

Assignment of this policy shall not be valid except with the written consent of this Company. This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

SAMPLE POLICY

Agent - WASHINGTON

Countersignature Date

OCTOBER 11, 1955

J. L. Turner

Agent

BEST C

1 Concealment, This entire policy shall be void if, whether
2 fraud, before or after a loss, the insured has wil-
3 fully concealed or misrepresented any ma-
4 terial fact or circumstance concerning this insurance or the
5 subject thereof, or the interest of the insured therein, or in case
6 of any fraud or false swearing by the insured relating thereto.
7 Uninsurable This policy shall not cover accounts, bills,
8 and currency, deeds, evidences of debt, money or
9 excepted property. securities; nor, unless specifically named
10 hereon in writing, bullion or manuscripts.
11 Perils not This Company shall not be liable for loss by
12 included. fire or other perils insured against in this
13 policy caused, directly or indirectly, by: (a)
14 enemy attack by armed forces, including action taken by na-
15 tary, naval or air forces in resisting an actual or an immediately
16 impending enemy attack; (b) invasion; (c) insurrection; (d)
17 rebellion; (e) revolution; (f) civil war; (g) usurped power; (h)
18 order of any civil authority except acts of destruction at the time
19 of and for the purpose of preventing the spread of fire, provided
20 that such fire did not originate from any of the perils excluded
21 by this policy; (i) neglect of the insured to use all reasonable
22 means to save and preserve the property at and after a loss, or
23 when the property is endangered by fire in neighboring prem-
24 ises; (j) nor shall this Company be liable for loss by theft.
25 Other Insurance. Other insurance may be prohibited or the
26 amount of insurance may be limited by en-
27 dorsement attached hereto.
28 Conditions suspending or restricting insurance. Unless other-
29 wise provided in writing added hereto this Company shall not
30 be liable for loss occurring
31 (a) while the hazard is increased by any means within the con-
32 trol or knowledge of the insured; or
33 (b) while a described building, whether intended for occupancy
34 by owner or tenant is vacant or unoccupied beyond a period of
35 sixty consecutive days; or
36 (c) as a result of explosion or riot, unless fire ensue, and in
37 that event for loss by fire only.
38 Other perils Any other peril to be insured against or sub-
39 ject of insurance to be covered in this policy
40 shall be by endorsement in writing hereon or
41 added hereto.
42 Added provisions. The extent of the application of insurance
43 under this policy and of the contribution to
44 be made by this Company in case of loss, and any other pro-
45 vision or agreement not inconsistent with the provisions of this
46 policy, may be provided for in writing added hereto, but no pro-
47 vision may be waived except such as by the terms of this policy
48 is subject to change.
49 Waiver No permission affecting this insurance shall
50 provisions. exist, or waiver of any provision be valid,
51 unless granted herein or expressed in writing
52 added hereto. No provision, stipulation or forfeiture shall be
53 held to be waived by any requirement or proceeding on the part
54 of this Company relating to appraisal or to any examination
55 provided for herein.
56 Cancellation This policy shall be cancelled at any time
57 of policy. at the request of the insured, in which case
58 this Company shall, upon demand and sur-
59 render of this policy, refund the excess of paid premium above
60 the customary short rates for the unexpired time. This pol-
61 icy may be cancelled at any time by this Company by giving
62 to the insured a ten days' written notice of cancellation with
63 or without tender of the excess of paid premium above the pro-
64 rata premium for the unexpired time.
65 If not tendered, shall be refunded on demand. Notice of cancellation shall
66 state that said excess premium (if not tendered) will be re-
67 funded on demand.
68 Mortgage If this mortgage is made payable in whole
69 interests and or in part, to a designated mortgagee not
70 obligations. named herein as the insured, such interest in
71 this policy may be cancelled by giving to such
72 mortgagee a ten days' written notice of can-
73 cellation.
74 If the insured fails to render proof of loss such mortgagee, upon
75 notice, shall render proof of loss in the form herein specified
76 within sixty (60) days thereafter and shall be subject to the pro-
77 ceedings hereof relating to appraisal and time of payment and of
78 bringing suit. If this Company shall claim that no liability ex-
79 isted as to the mortgagor or owner, it shall, to the extent of pay-
80 ment of loss to the mortgagee, be subrogated to all the mort-
81 gagee's rights of recovery, but without impairing mortgagee's
82 right to sue; or it may pay off the mortgage debt and require
83 an assignment thereof and of the mortgage. Other provisions

84 relating to the interests and obligations of such mortgagee may
85 be added hereto by agreement in writing.
86 Pro rata liability. This Company shall not be liable for a greater
87 proportion of any loss than the amount
88 borne by the insured shall bear to the whole insurance covering the
89 property against the peril involved, whether collectible or not.
90 Requirements in The insured shall give immediate written
91 case loss notice to this Company of any loss, protect
92 the property from further damage, forthwith
93 separate the damaged and undamaged personal property, put
94 it in the best possible order, furnish a complete inventory of
95 the destroyed and undamaged property, showing in
96 detail quantities, costs, actual cash value and amount of loss
97 claimed; and within sixty days after the loss, unless such time
98 is extended in writing by this Company, the insured shall render
99 to this Company a proof of loss, signed and sworn to by the
100 insured, stating the knowledge and belief of the insured as to
101 the following: the time and origin of the loss, the interest of the
102 insured and of all others in the property, the actual cash value of
103 each item thereof and the amount of loss thereto, all encum-
104 brances thereon, all other contracts of insurance, whether valid
105 or not, covering any of said property, any changes in the title,
106 use, occupation, location, possession or exposures of said prop-
107 erty since the issuing of this policy, by whom and for what
108 purpose any building herein described and the several parts
109 thereof were occupied at the time of loss and whether or not it
110 then stood on leased ground, and shall furnish a copy of all the
111 descriptions and schedules in all policies and, if required, verified
112 plans and specifications of any building, fixtures or machinery
113 destroyed or damaged. The insured, as often as may be reason-
114 ably required, shall exhibit to any person designated by this
115 Company all that remains of any property herein described, and
116 submit to examinations under oath by any person named by this
117 Company, and subscribe the same; and, as often as may be
118 reasonably required, shall produce for examination all books of
119 account, bills, invoices and other vouchers, or certified copies
120 thereof if originals be lost, at such reasonable time and place as
121 may be designated by this Company or its representative, and
122 shall permit extracts and copies thereof to be made.
123 Appraisal. In case the insured and this Company shall
124 fail to agree as to the actual cash value or
125 the amount of loss, then, on the written demand of either, each
126 shall select a competent and disinterested appraiser and notify
127 the other of the appraiser selected within twenty days of such
128 demand. The appraisers shall first select a competent and dis-
129 interested umpire; and failing for fifteen days to agree upon
130 such umpire, then, on request of the insured or this Company,
131 such umpire shall be selected by a judge of a court of record in
132 the state in which the property covered is located. The ap-
133 praisers shall then appraise the loss, stating separately actual
134 cash value and loss to each item; and, failing to agree, shall
135 submit their differences, only, to the umpire. An award in writ-
136 ing, so itemized, of any two when filed with this Company shall
137 determine the amount of actual cash value and loss. Each
138 appraiser shall be paid by the party selecting him and the ex-
139 penses of appraisal and umpire shall be paid by the parties
140 equally.
141 Company's It shall be optional with this Company to
142 options. take all, or any part, of the property at the
143 agreed or appraised value, and also to re-
144 pair, rebuild or replace the property destroyed or damaged with
145 other of like kind and quality within a reasonable time, on giv-
146 ing notice of its intention so to do within thirty days after the
147 receipt of the proof of loss herein required.
148 Abandonment. There can be no abandonment to this Com-
149 pany of any property.
150 When loss The amount of loss for which this Company
151 payable. may be liable shall be payable sixty days
152 after proof of loss, as herein provided, is
153 received by this Company and ascertainment of the loss is made
154 either by agreement between the insured and this Company ex-
155 pressed in writing or by the filing with this Company of an
156 award as herein provided.
157 Suit. No suit or action on this policy for the recov-
158 ery of any claim shall be sustainable in any
159 court of law or equity unless all the requirements of this policy
160 shall have been complied with, and unless commenced within
161 twelve months next after inception of the loss.
162 Subrogation. This Company may require from the insured
163 an assignment of all right of recovery against
164 any party for loss to the extent that payment therefor is made
165 by this Company.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy shall not be valid unless counter-
signed by the duly authorized Agent of this Company at the agency hereinbefore mentioned.

W. M. Hoffner
Secretary

Al. Howard
President

STOCK COMPANY

Standard Fire Insurance Policy for Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maryland, Michigan, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming.

See inside of Policy for Amount(s) of Insurance and Peril(s) Insured Against

No. 11000/30119

Expires OCTOBER 13, 1958

Basic Amount \$5,500.00

Premium \$17.88

Property BD

Insured's name and mailing address

LILA K. MYERS
3359 CLAY PLACE, N. E.
WASHINGTON, D. C.

It is important that the written portions of all policies covering the same property read exactly alike.
If they do not, they should be made uniform at once.

Officers

ALBERT W. HOWARD
PRESIDENT

V. MANNING HOFFMAN
VICE PRESIDENT & SECRETARY

EDWARD C. BALTZ
VICE PRESIDENT

JAMES N. FITZPATRICK, JR.
ASSISTANT SECRETARY

HERBERT M. PASEWALK
ASSISTANT SECRETARY

RICHARD H. WINKELMAN
ASSISTANT SECRETARY

THE PRESIDENT AND DIRECTORS OF THE

Firemen's
Insurance
CHARTERED BY
CONGRESS 1837

OF WASHINGTON AND GEORGETOWN
IN THE DISTRICT OF COLUMBIA

HOME OFFICE

303 Seventh Street, N. W.

WASHINGTON 4, D. C.

Date of Cancellation, YEAR MO DAY
Date of Policy, - - -
Time in Force, - - -

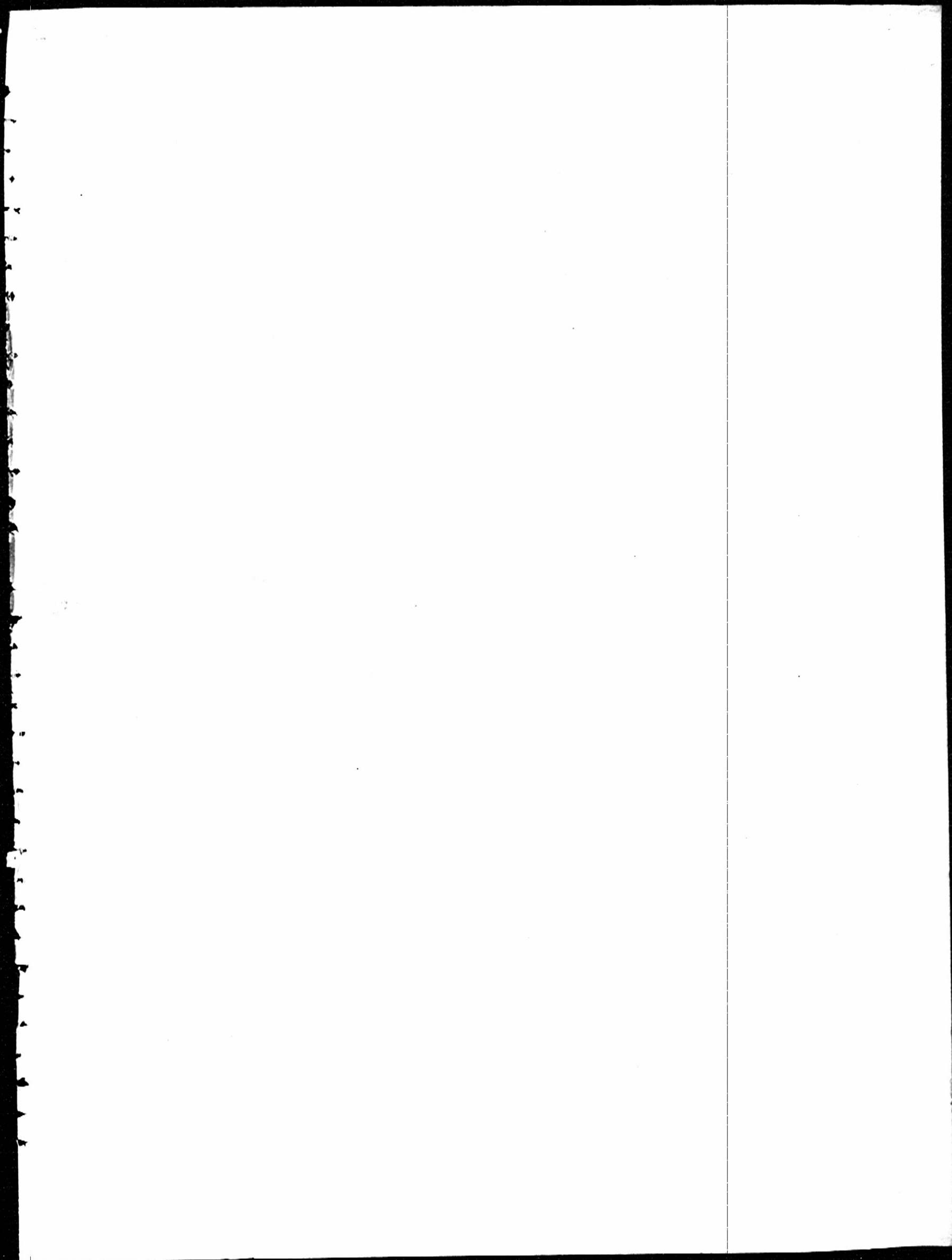
PERIL	WHOLE PREM.	RETURN PREM.	REPT. CODE
Fire			
E.C.			
Total			XXXX

☐ Short Rate

☐ Pro Rata

If Cancelled Pro Rata, Explain Why: Also Give
Number of Replacing Policy, if any.

BEST COPY AVAILABLE
from the original bound volume



(Note to Agents: No additions or changes in wording of this form permitted. Authorizing changes may be made by separate endorsement only, copies to be attached to all daily reports.)

HARRY M. HULL, CLERK

Insurance attaches only to those items described on the first page of this policy for which an amount is shown in the space provided therefor and for not exceeding said amount.

Dwelling Coverage: When the insurance under this policy covers a dwelling, occupied by not exceeding three families, such insurance shall cover building equipment and fixtures and outdoor equipment pertaining to the services of the premises (if the property of the owner of the dwelling), while located on the described premises, but not trees, shrubs, plants or lawns.

The Insured may apply up to ten per cent (10%) of the amount specified for the dwelling to cover private structures appertaining to the dwelling described and located on the premises, but not structures used in whole or in part for mercantile, manufacturing, or farming purposes nor any structure rented or leased to other than a lessee of the dwelling covered hereunder. This exclusion does not apply to buildings used exclusively for private garage purposes.

The Insured may apply up to ten per cent (10%) of the amount specified for the dwelling item to cover rental value as defined hereinafter, but not exceeding one-twelfth (1/12) of said ten per cent (10%) for each month the described dwelling or appurtenant private structures (except those used for mercantile, manufacturing or farming purposes) or parts thereof are untenable.

Contents Coverage: When the insurance under this policy covers household and personal property, such insurance shall cover on household and personal property usual or incidental to the occupancy of the premises as a dwelling (except aircraft, motor vehicles and boats other than rowboats and canoes), including household and personal property purchased under an installment plan and usual or incidental to a dwelling, belonging to the Insured or for which the Insured may be liable or, at the option of the Insured belonging to a member of the family of the Insured or to a servant thereof, while contained in the described dwelling or appurtenant private structures or while on the described premises.

The Insured may apply up to ten per cent (10%) of the amount specified for the household and personal property item to cover property described therein and insured thereby (except rowboats, canoes, animals and pets) belonging to the Insured or any member of the family of, and residing with the Insured, while elsewhere than on the described premises but within the limits of that part of Continental North America included within the United States of America, Alaska, the Dominion of Canada and Newfoundland; however, it is warranted by the Insured that such extension of this insurance shall in no wise inure directly or indirectly to the benefit of any carrier or other bailee.

The Insured (if not the owner of the described premises) may apply up to ten per cent (10%) of the amount specified for the household and personal property item to cover improvements, alterations or additions to the described dwelling and private structures appertaining thereto (except those used for mercantile, manufacturing or farming purposes).

Loss, if any, under the household and personal property item shall be adjusted with the Insured specifically named and shall be payable to him unless other payee is specifically named hereunder.

Trees, Shrubs and Plants: When the insurance under this policy covers specifically on trees, shrubs and plants (except those grown for commercial purposes) on the described premises, this Company shall not be liable for more than a stated value on any one tree, shrub or plant as set forth on the first page of this policy.

Rental Value Coverage: When the insurance under this policy covers on rental value, such insurance shall cover the rental value (as hereinafter defined) of dwelling and appurtenant private structures (except those used for mercantile, manufacturing or farming purposes) or parts thereof described in "Dwelling Coverage." The term "rental value" shall mean the fair rental value of the dwelling or appurtenant private structures (except those used for mercantile, manufacturing or farming purposes) whether rented or not for the period of time required with the exercise of due diligence and dispatch to restore the same to a tenable condition less such charges and expenses as do not continue.

It is a condition of this insurance that in the event the Insured elects to apply the 10% optional provisions under the "Dwelling Coverage" or "Contents Coverage," this Company shall not be liable for a greater proportion of any loss than would have been the case if similar election were made under optional provisions of all policies covering the same property.

Loss Clause: Any loss hereunder shall not reduce the amount of this policy.

Electrical Apparatus Clause: This Company shall not be liable for any loss resulting from any electrical injury or disturbance to electrical appliances, devices or wiring from artificial causes unless fire ensues and, if fire does ensue, this Company shall be liable only for its proportion of loss caused by such ensuing fire.

Inherent Explosion Clause: This policy shall cover direct loss to the property covered caused by explosion occurring in the structure described in the policy or in any structure containing property covered hereunder from hazards inherent therein, but this Company shall not be liable for loss by explosion originating within steam boilers, steam pipes, steam turbines, steam engines fly wheels.

Permission Granted: (a) For such use of the premises as is usual or incidental to the described occupancy; (b) To be unoccupied or vacant without limit of time; (c) To make alterations, additions and repairs and to complete structures in course of construction and this policy (so far as it applies to building) covers all lumber and materials on the premises or adjacent thereto; (d) To be used for not exceeding four boarders or roomers.

Consequential Loss and Damage Assumption Clause: This Company also assumes liability for any loss or damage to the personal property covered by this policy, while contained in the building(s) described in "Contents Coverage" covering such personal property, due to interruption of power or change of temperature resulting from total or partial destruction or disablement of power heating, cooling or refrigeration apparatus including all connections or supply pipes in said building(s) caused by physical damage resulting from an insured peril to said building(s) or equipment therein.

Subrogation Waiver Clause: Any agreement of release from liability entered into by the Insured prior to loss hereunder shall not affect this policy or the right of the Insured to recover hereunder.

Removal of Debris Clause: It is a condition of this policy that this insurance covers expenses incurred in the removal of all debris of the property insured hereunder which may be occasioned by loss caused by any of the perils insured against in this policy. However, the total liability under this policy shall not exceed the amount named therein, nor such proportion of such expense as the amount of insurance hereunder bears to the total amount of all insurance, whether such insurance includes this clause or not. In no event shall this policy cover against loss occasioned by the enforcement of any state or municipal law or ordinance which necessitates the demolition of any portion of the insured building which has not suffered damage by any of the perils insured against in this policy unless such liability is specifically assumed elsewhere in the policy. Cost of removal of debris shall not be considered in the determination of actual cash value when applying any Reduced Rate Contribution Clause attached to this policy.

Liberalization Clause: If during the period that insurance is in force under this policy, or within 45 days prior to the inception date thereof, on behalf of this Company there be filed with and approved or accepted by the insurance supervisory authorities, in conformity with law, any forms, endorsements, rules or regulations by which this insurance could be extended or broadened, without additional premium charge, by endorsement or substitution of form, then such extended or broadened insurance shall inure to the benefit of the Insured hereunder as though such endorsement or substitution of form had been made.

Mortgagee Clause: (This entire clause is void unless the name of the mortgagee or trustee is inserted on the first page of this policy in space provided under this caption.) Loss, if any, under this policy, shall be payable to the aforesaid as mortgagee (or trustee) as interest may appear under all present or future mortgages upon the property herein described in which the aforesaid may have an interest as mortgagee (or trustee), in order of precedence of such mortgages, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided, also, that the mortgagee (or trustee) shall notify this Company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

This Company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for ten days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this Company shall have the right, on like notice, to cancel this agreement.

Whenever this Company shall pay the mortgagee (or trustee) any sum for loss under this policy and shall claim that, as to the mortgagee or owner, no liability therefor existed, this Company shall, to the extent of such payment, be thereupon legally subrogated to all rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage, or may at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and the mortgagee (or trustee) shall receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall be made until the mortgagee (or trustee) has received the full amount of said mortgagee's (or trustee's) claim.

The Provisions Printed on the Back of This Form Are Hereby Referred to and Made a Part Hereof.

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EXTENDED COVERAGE

(Perils of Windstorm, Hail, Explosion, Riot, Riot Attending a Strike, Civil Commotion, Aircraft, Vehicles, Smoke, Except as Hereinafter Provided). (Note—No Additions or Erasures in wording in This Form Permitted.) (Effective Only When Premium for Extended Coverage is Stated on First Page of This Policy or When Made a Part of This Policy by Endorsement and Additional Premium Charged.)

In consideration of the premium for this coverage shown on the first page of this policy, and subject to provisions and stipulations (hereinafter referred to as "provisions") herein and in the policy to which this endorsement is attached, including endorsements thereon, the coverage of this policy is extended to include direct loss by WINDSTORM, HAIL, EXPLOSION, RIOT, RIOT ATTENDING A STRIKE, CIVIL COMMOTION, AIRCRAFT, VEHICLES AND SMOKE.

This endorsement does not increase the amount or amounts of insurance provided in the policy to which it is attached.

If this policy covers on two or more items, the provisions of this endorsement shall apply to each item separately.

Substitution of Terms: In the application of the provisions of this policy, including endorsements (but not this endorsement), to the perils covered by this Extended Coverage Endorsement, wherever the word "fire" appears there shall be substituted therefor the peril involved or the loss caused thereby, as the case requires.

Apportionment Clause: This Company shall not be liable for a greater proportion of any loss less the amount of deductible, if any, from any peril or perils included in this endorsement than (1) the amount of insurance under this policy bears to the whole amount of fire insurance covering the property, or which would have covered the property except for the existence of this insurance, whether collectible or not, and whether or not such other fire insurance covers against the additional peril or perils insured hereunder, (2) nor for a greater proportion of any loss less the amount of deductible, if any, than the amount hereby insured bears to all insurance whether collectible or not, covering in any manner such loss, or which would have covered such loss except for the existence of this insurance; except if any type of insurance other than fire extended to cover additional perils or windstorm insurance applies to any loss to which this insurance also applies, or would have applied to any such loss except for the existence of this insurance, the limit of liability of each type of insurance for such loss, hereby designated as "joint loss", shall first be determined as if it were the only insurance and this type of insurance shall be liable for no greater proportion of joint loss than the limit of its liability for such loss bears to the sum of all such limits. The liability of this Company (under this endorsement) for such joint loss shall be limited to its proportionate part of the aggregate limit of this and all other insurance of the same type. The words "joint loss", as used in the foregoing, mean that portion of the loss in excess of the highest deductible, if any, to which this endorsement and other types of insurance above referred to both apply.

War Risk Exclusion Clause: This Company shall not be liable for loss caused directly or indirectly by: (a) hostile or warlike action in time of peace or war, including action in hindering, combating or defending against an actual, impending or expected attack, (1) by any government or sovereign power (de jure or de facto), or by any authority maintaining or using military, naval or air forces; or (2) by military, naval or air forces; or (3) by an agent of any such government, power, authority or forces, it being understood that any discharge, explosion or use of any weapon of war employing atomic fission or radioactive force shall be conclusively presumed to be such a hostile or warlike action by such a government, power, authority or forces; (b) insurrection, rebellion, revolution, civil war, usurped power, or action taken by governmental authority in hindering, combating or defending against such an occurrence.

Waiver of Policy Provisions: A claim for loss from perils included in this Extended Coverage shall not be barred because of change of occupancy, nor because of vacancy or unoccupancy.

Loss Deductible Clause: It is a condition of this Extended Coverage Endorsement, that, in accordance with the provisions hereinafter contained, the sum of Fifty Dollars (\$50.00) shall be deducted from the amount of loss resulting from each windstorm or hailstorm. This condition shall apply separately to each building or structure and separately to personal property in the open.

This Loss Deductible Clause does not apply to contents contained in any building described herein.

This Company shall be liable for its proportion of the loss in excess of Fifty Dollars (\$50.00) deducted in accordance with the apportionment provisions of this Extended Coverage Endorsement.

The provisions of this Loss Deductible Clause shall not apply to insurance covering Business Interruption, Earnings, Tuition Fees, Extra Expense, Additional Living Expense, Ground Rents, Rents, Leasehold Interest, Profits and Commissions or Errors and Omissions.

Provisions Applicable Only to Windstorm and Hail: This Company shall not be liable (1) for loss caused directly or indirectly by (a) frost or cold weather, or (b) ice (other than hail), sleet, snowstorm, waves, tide, tidal wave, high water, overflow of streams or bodies of water, or spray therefrom, all whether driven by wind or not; (2) for loss to the interior of the building(s) or the property covered therein caused by rain, snow, sand, or dust, whether driven by wind or not, unless the building(s) covered or containing the property covered shall first sustain an actual damage to roof or walls by the direct force of wind or hail and then shall be liable for loss to the interior of the building(s) or the property covered therein as may be caused by rain, snow, sand, or dust entering the building(s) through openings in the roof or walls made by direct action of wind or hail; (3) for loss to lawns, trees, shrubs and plants; or (4) for loss by water from sprinkler equipment or other piping, unless such equipment or piping be damaged as a direct result of wind or hail.

Unless liability therefor is specifically assumed on the first page of this policy or in the form attached to this policy by separate and specific item(s), or by endorsement hereon, this Company shall not be liable for damage to the following property: (a) grain, hay, straw or other crops outside of buildings or (b) windmills, windpumps or their towers, or (c) crop silos (or their contents), or (d) outdoor radio and television antennas and aerials, whether attached to building(s) or not, including their lead-in wiring, masts and towers.

Provisions Applicable Only to Explosion: Loss by explosion shall include direct loss resulting from the explosion of accumulated gases or unburned fuel within the firebox (or combustion chamber) of any fired vessel or within the flues or passages which conduct the gases of combustion therefrom. However, this Company shall not be liable for loss by explosion, rupture or bursting of:

(a) steam boilers, steam pipes, steam turbines or steam engines; or
(b) rotating parts of machinery caused by centrifugal force; if owned by, leased by or actually operated under the control of the Insured.

The following are not explosions within the intent or meaning of these provisions:

(a) Concussion unless caused by explosion.
(b) Electrical arcing.
(c) Water hammer.
(d) Rupture or bursting of water pipes.

Any other explosion clause made a part of this policy is superseded by this endorsement.

Provisions Applicable Only to Riot, Riot Attending a Strike and Civil Commotion: Loss by riot, riot attending a strike or civil commotion shall include direct loss by acts of striking employees of the owner or tenant(s) of the described building(s) while occupied by said striking employees and shall also include direct loss from pillage and looting occurring during and at the immediate place of a riot, riot attending a strike or civil commotion. Unless specifically endorsed hereon in writing, this Company shall not be liable, however, for loss resulting from damage to or destruction of the described property owing to change in temperature or humidity or interruption of operations, whether or not such loss is covered by this policy as to other perils.

Provisions Applicable Only to Loss by Aircraft and Vehicles: The term "vehicles," as used in this Extended Coverage, means vehicles running on land or tracks but not aircraft. Loss by aircraft or by vehicles shall include only direct loss resulting from actual physical contact of an aircraft or a vehicle with property covered hereunder or with the building containing the property covered hereunder, except that loss by aircraft includes direct loss by objects falling therefrom. This Company shall not be liable, however, for loss (a) by any vehicle owned or operated by the Insured or by any tenant of the described premises; (b) by any vehicle to fences, driveways, walks or lawns; (c) to any aircraft or vehicle including contents thereof other than stocks of aircraft or vehicles in process of manufacture or for sale.

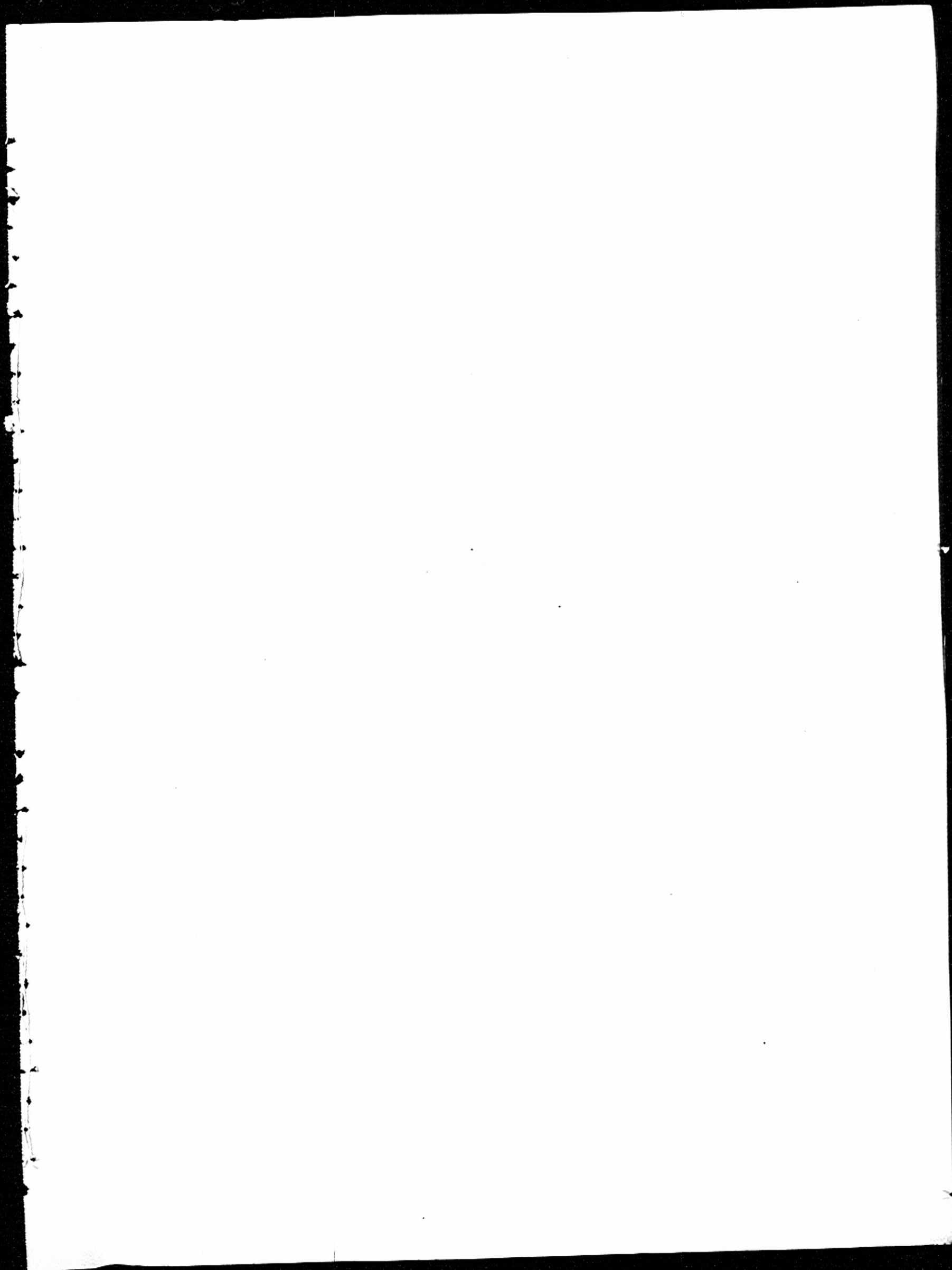
Provisions Applicable Only to Smoke: The term "smoke" as used in this Extended Coverage means only smoke due to a sudden, unusual and faulty operation of any heating or cooking unit, only when such unit is connected to a chimney by a smoke pipe or by a vent, and while in or on the premises described in this policy, excluding, however, smoke from fireplaces or industrial apparatus.

Provisions Applicable Only when this Endorsement is attached to a Policy covering Business Interruption, Earnings, Tuition Fees, Extra Expense, Additional Living Expense, Ground Rents, Rents, Leasehold Interest, Profits and Commissions or Consequential Loss: When this Endorsement is attached to a policy covering Business Interruption, Earnings, Tuition Fees, Extra Expense, Additional Living Expense, Ground Rents, Rents, Leasehold Interest, Profits and Commissions, or Consequential Loss, the term "direct", as applied to loss, means loss, as limited and conditioned in such policy, resulting from direct loss to described property from perils insured against; and while the business of the owner or tenant(s) of described building(s) is interrupted by a strike at the described location, this Company shall not be liable for any loss owing to interference by any person(s) with rebuilding, repairing or replacing the property damaged or destroyed or with the resumption or continuation of business.

CAUTION—When this Endorsement is attached to one fire policy, the Insured should secure like coverage on all fire policies covering the same property.

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OFFICIAL TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.,
Monday, October 27, 1958.

The above-entitled case came on for hearing on motion at 10 o'clock a.m., on Monday, October 27, 1958, in the United States District Court for the District of Columbia, in the Court House, at Washington, D. C.

BEFORE

HONORABLE DAVID A. PINE, Judge of the United States District Court for the District of Columbia

APPEARANCES:

LYNN O. COOMBS, Esquire, on behalf of the plaintiff; and
N. M. BAKER, Esquire, on behalf of the defendant.

2

PROCEEDINGS

THE DEPUTY CLERK: No. 24, Allied Building Service, Inc., v. Myers.

THE COURT: This is your motion for summary judgment?

MR. BAKER: Yes, my motion, Your Honor.

I appear on behalf of the third party defendant, the insurance company. These are the facts, if the Court please.

The third party defendant is in the insurance business and routinely issued a fire insurance policy to the third party plaintiff, the insured.

A fire occurred on October 15, 1957, as the result of some negligence of a third party, an oil burner service company, the Brookland Coal Company, and the property was damaged.

Thereafter a claim was asserted against the insurance company for the amount of the damage in the amount of \$1,112.50, which the insurance company was prepared to pay if a subrogation receipt which they had prepared and submitted to the insured was signed.

The insured refused to sign the subrogation receipt, and thereafter asserted a claim for damages against the coal company, and the coal company insurer --

THE COURT: This is different from your client? Yours is the Firemen's?

3 MR. BAKER: Yes, sir, the Firemen's. The Aetna Casualty is the coal company carrier.

THE COURT: What is the Aetna Company doing in there?

MR. BAKER: They paid \$2,600, \$2612.32 to the third party plaintiff for this fire loss, thereby wiping out the subrogation claim.

We filed an answer in this case tendering the amount of \$1,112.50 upon the delivery of the subrogation receipt, which we had prepared, and that tender was made prior to the time that this release from the third party plaintiff was obtained.

The position of the insurance company is --

THE COURT: Now, the third party plaintiff took money from the Aetna Company in settlement of the claim against the Brookland Company?

MR. BAKER: That is right.

THE COURT: The Brookland Company being responsible for the fire?

MR. BAKER: Yes.

THE COURT: And you had insured the third party plaintiff, being Lila K. Myers?

MR. BAKER: Yes.

THE COURT: And you refused to pay because you could not get an assignment or a subrogation right against the wrongdoer?

4 MR. BAKER: That is completely correct.

THE COURT: And the wrongdoer has already paid off?

MR. BAKER: Yes, sir.

THE COURT: If you had not pursued your remedy they might have to be paid twice then?

MR. BAKER: Yes.

THE COURT: Are these facts admitted?

MR. BAKER: I think that they are.

THE COURT: Are any in dispute?

MR. BAKER: I don't believe that there is any disputed.

THE COURT: I cannot grant summary judgment if there is.

MR. BAKER: I don't believe that there is any dispute as to the occurrence of the fire; as to the subrogation rights of the Firemen's Insurance Company as insurer; as to the payment of \$2612. by the Aetna Company for the damage, for the entire damage done to the house; and the refusal of the insured to deliver a subrogation receipt which was requested.

I don't think that there is any controversy about the facts.

THE COURT: And payment by the Aetna Company on behalf of the wrongdoer?

MR. BAKER: That is correct.

THE COURT: And the wrongdoer being the Brookland Coal Company?

5

MR. BAKER: That is right.

MR. COOMBS: I think that there is a dispute, Your Honor, as to most of these material facts.

First of all, the third party plaintiff has never been offered a subrogation agreement, and no payment has been made on that subrogation agreement; and the third party plaintiff was offered a loan, but the third party plaintiff claimed she did not want a loan, that she wanted to have her property indemnified, or her loss indemnified.

I think that is a material issue. We certainly deny that there was any offer of subrogation.

In addition, the facts seem to show that Firemen's by its conduct and by its opening statement have waived the right of subrogation and did prior to the payment herein.

THE COURT: Well, now, if Lila Myers has recovered, who brought the suit originally?

MR. COOMBS: The suit originally was brought by the builder who did the repairs, for payment on the repairs.

THE COURT: Against the owner?

MR. COOMBS: Against the owner.

THE COURT: Lila Myers?

MR. COOMBS: That is right, the plaintiff.

THE COURT: There was a fire?

MR. COOMBS: The fire is admitted.

6 THE COURT: The fire was before this? This was work that was done because of the fire?

He brought suit against Lila Myers, and she said to the insurance company that insured her, pay off, and the insurance company has failed to pay off, and it says she has already received full payment from the wrongdoer?

MR. COOMBS: That is in effect correct, except that there was a waiver.

THE COURT: A waiver by whom?

MR. COOMBS: By Firemen's.

THE COURT: They were willing to pay if the Aetna had not paid?

MR. COOMBS: They were not willing to pay at any time, and they were not willing to pay before Aetna paid, and that is where the material issue is.

THE COURT: Well, now Aetna has paid in full.

How can you recover against Firemen's?

MR. COOMBS: We claim against Firemen's the expenses of the suit with Aetna.

THE COURT: You brought suit against Aetna?

MR. COOMBS: That is correct, and that settlement was only obtained after the developments which were incident to this --

THE COURT: Because of Firemen's failure to pay, you brought suit against Aetna?

7 MR. COOMBS: That is right.

THE COURT: Why didn't you proceed against Firemen's?

MR. COOMBS: We did; in the third party plaintiff suit.

THE COURT: I see, and you have already recovered against Aetna while this was pending?

MR. COOMBS: We recovered against Aetna after -- that is correct. While this was pending, we recovered.

THE COURT: After you brought suit?

MR. COOMBS: Yes, after we brought suit.

THE COURT: Now, all you are asking is the expense of recovering that money from Aetna?

MR. COOMBS: That is one element.

THE COURT: \$4,500 seems a right large amount.

MR. COOMBS: In the suit against the third party defendant, we claim that there is negligence and damage accruing from the failure to pay.

THE COURT: What could that be, other than interest?

MR. COOMBS: The fee that was paid to me, outlay, out of pocket expenses that were incurred as the result of this delay and lapse, and I think that is a question of fact that would have to be established by proof and testimony.

I don't believe this material, these facts, are so clear or undisputed that summary judgment will lie. It would in effect deny the third party plaintiff his day in court and his right to be heard on the facts.

8 MR. BAKER: May I say to the Court that we took the deposition of the plaintiff, the third party plaintiff, and if you will look at the bottom of page 10 --

MR. COOMBS: If Your Honor please --

MR. BAKER: Page 10 of the deposition.

MR. COOMBS: I don't think this deposition is properly in the record.

THE COURT: On a motion for summary judgment?

MR. COOMBS: It has not been signed.

THE COURT: I do not see it in the file.

Has it been filed?

MR. COOMBS: It should not have been filed. We haven't been notified of the regularity of it or anything.

THE COURT: Is that marked filed?

MR. BAKER: No, sir, this was a copy sent to me.

MR. COOMBS: It is not before the court.

THE COURT: Do you know whether it is downstairs?

MR. COOMBS: No, sir.

THE COURT: Will you call up to see whether any deposition is down there?

THE DEPUTY CLERK: Yes, sir.

THE COURT: I cannot look at it if it is not filed.

MR. BAKER: I will say, aside from the deposition, if the Court please, there is no question but that an insurance company has
9 the right of subrogation under its policy, and the policy is in the record, and the third party plaintiff's action in settling with the wrongdoer wipes out that right of subrogation.

THE COURT: What do you have to say about that?

MR. COOMBS: That would be true if the facts were true, but that right of subrogation has not been offered, and it so happens this settlement was the result of the laches and delay in Firemen's actions.

Now, it is true that once subrogation occurs, or if it is offered, then they have a standing, a right to recover, but Firemen's has never done one thing toward subrogation or anything.

They sat on their hands and never asked to be indemnified.

MR. BAKER: I don't like to belabor the point, Your Honor.

THE COURT: Well, I have to see whether there is a genuine issue of a material fact. If there is, I cannot grant your motion.

MR. BAKER: Let me say this. If you will look in the record, you will find the answer, the Firemen's answer in there, and it was signed on June 4th, and in the answer was the tender of payment at that time, in advance of the time of the settlement with the wrongdoer, the Brookland Coal Company.

10 Firemen's has always been willing to pay upon the issuance and the execution of a subrogation receipt.

Now, there can be no subrogation receipt --

THE COURT: Where is it in here that you say this settlement was made after you made your tender?

MR. BAKER: In the answer of the third party defendant, in the

fourth defense, a tender of \$1,112.50. I have a copy of that.

THE COURT: Where do you find that? What answer is that?

MR. BAKER: Of the third party defendant, in the fourth defense.

THE COURT: I see; I have that.

MR. BAKER: It says, No. 1, tender of agreed settlement to the third party plaintiff. Third party defendant tenders herewith to the third party plaintiff the agreed sum of \$1,112.50 as the sum agreed upon by the third party plaintiff in full settlement of its claim, and upon delivery to this third party defendant of the subrogation receipt, usual in settlement of the insurance company claims.

A copy of that answer was mailed on the 4th of June to Mr. Coombs as attorney for Mrs. Myers.

THE COURT: There is no denial?

MR. BAKER: There is no denial to that.

11 THE COURT: Is there any denial?

MR. COOMBS: There is a denial invoked in this record that that was mailed on the 4th of June. As I recall, that was a weekend, and that settlement was made before that reached me, and I had no knowledge of its tender. Actually, the tender has not been made. This didn't reach us prior to the 7th of June, when this settlement was made.

THE COURT: They say you did receive this tender, and you refused it.

MR. COOMBS: No, I didn't refuse it.

THE COURT: That you made it impossible for you to give subrogation rights.

You settled with the other company.

MR. COOMBS: Before the tender.

THE COURT: Well, even so --

MR. COOMBS: As a matter of law, I don't think that places the Firemen's company in a position where they are exonerated.

THE COURT: How did you get more money out of the Aetna Company than you tried to get back from Firemen's?

MR. COOMBS: There was negligence, Your Honor, and some of it was consequential. There was consequential damage.

THE COURT: It seems to me you have made full recovery. I cannot let you recover twice.

MR. COOMBS: There is no attempt to recover twice, Your Honor. There is the issue of expenses in the recovery against Aetna.
12 The expenses of recovery against Aetna amounts to \$900.

THE COURT: Well, I am going to grant the motion for summary judgment. I do not think your people can recover twice. These expenses are not recoverable when there is a tender made. You put yourself in the position where you cannot receive that tender and you cannot file a subrogation agreement.

MR. COOMBS: I quite agree that would be true, and I do not belabor the point, but I want to clarify the fact that we didn't receive a tender until after the settlement. Up to that time there had been nothing done, but when Firemen's got wind of the fact that there would be a possible settlement, I guess they hurried to do this, to make this answer, but this didn't come to us prior to the settlement.

I feel we are going to have to go further in the matter, Your Honor.

THE COURT: That is quite all right with me.
(Thereupon the instant hearing was concluded.)

[Filed October 30, 1958]

**ORDER GRANTING THIRD-PARTY DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT AGAINST THE
DEFENDANT**

Upon consideration of the motion of the third-party defendant, the Firemen's Insurance Co. of Washington, D. C., for a summary judgment in its favor, and after argument in open Court by both counsels for the defendant-third party plaintiff and third party defendant, it is by the Court this 30th day of October, 1958

ORDERED

1. That said motion for summary judgment be, and the same is hereby granted.

2. That the third-party plaintiff's Complaint filed herein against the third party defendant be, and the same is hereby dismissed with costs assessed against the defendant-third party plaintiff.

/s/ David J. Pine
Judge

TO: Lynn O. Coombs and
Attorney for Lila K. Myers
Third-Party Defendant
918 F Street, N. W.
Washington, D. C.

Walter M. King, Jr.
Attorney for the Plaintiff
Allied Building Services, Inc.
504 Southern Building
Washington 5, D. C.

Please take notice that the foregoing Order will be presented to Judge David A. Pine for signature on October 30, 1958, through the office of the Motion Commissioner of this Court.

MERCIER, SANDERS, BAKER AND
SCHNABEL

By: /s/ N. Myer Baker
Attorneys for Third-Party Defendant
Firemen's Insurance Co. of
Washington, D. C.
* * * * *

[Certificate of Service]

[Filed November 12, 1958]

NOTICE OF APPEAL

Notice is hereby given this 12th day of November, 1958, that Lila K. Myers, Defendant and Third-Party Plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 30th day of October, 1958 in favor of The Firemen's Insurance Co. of Washington, D. C. (A Body Corporate), Third-Party Defendant, against said Lila K. Myers.

/s/ Lynn O. Coombs
Attorney for Third-Party Plaintiff
* * * * *

BRIEF FOR APPELLEE

In The United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 14,871

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED FEB 25 1959

Joseph W. Stewart
CLERK

LILA K. MYERS,

Appellant,

v.

**THE FIREMEN'S INSURANCE COMPANY OF
WASHINGTON, D. C. (A BODY CORPORATE),**

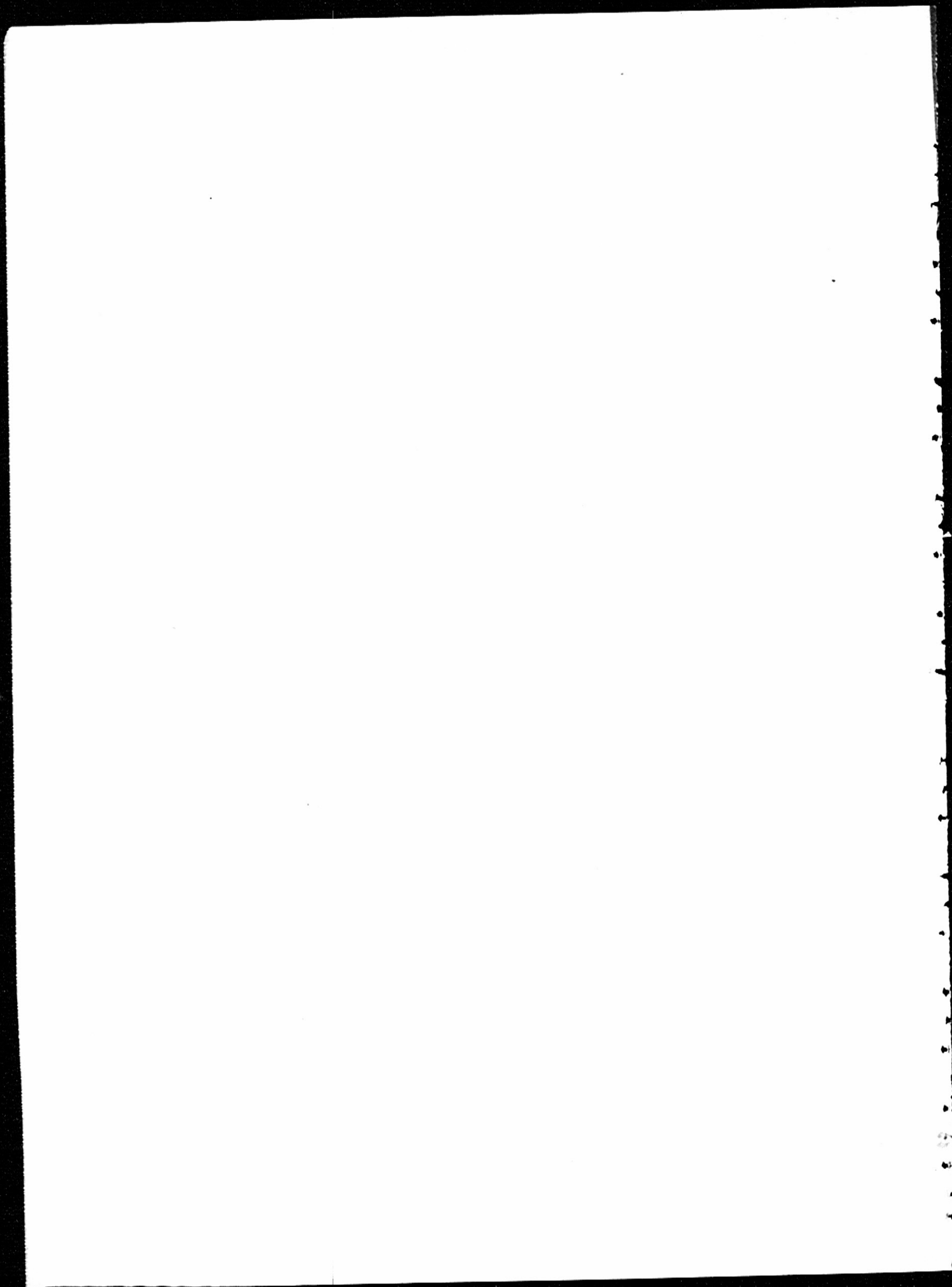
Appellee.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

**MERCIER, SANDERS, BAKER AND
SCHNABEL**

**613 - 15th Street, N. W.
710 Metropolitan Building
Washington 5, D. C.**

Attorneys for Appellee.

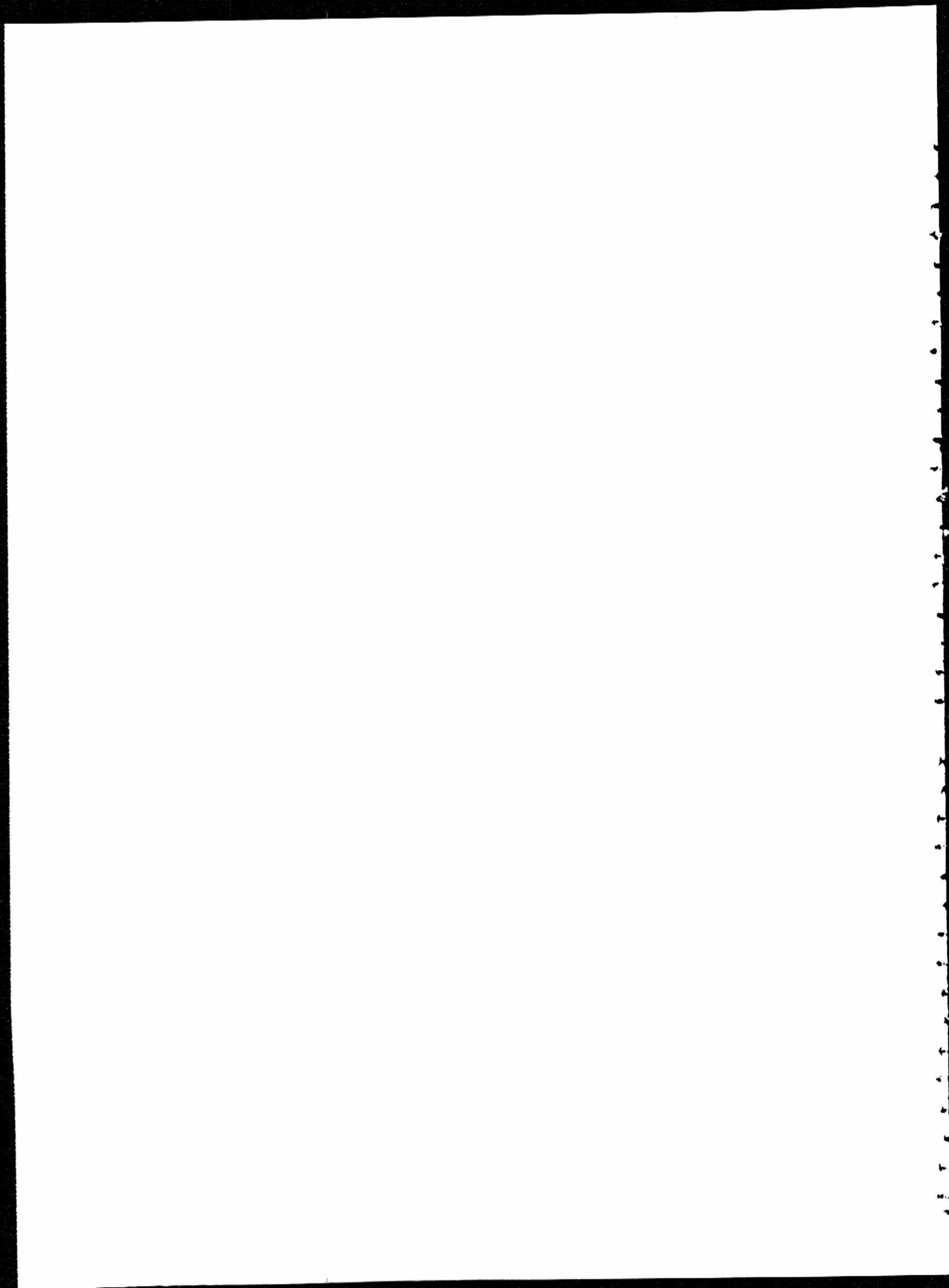


QUESTIONS PRESENTED ON APPEAL

Appellee believes that the questions presented on appeal are -

1. Can a party insured recover from her fire insurance company on a fire loss claim where she executed and delivered a full and complete release to a third-party tortfeasor in full settlement of the fire damage loss, thereby destroying the insurer's right to subrogation provided for under the fire insurance policy?

2. Is an insured entitled to recover twice on the same claim, once from the tortfeasor and once from the fire insurance company?



(i)

I N D E X

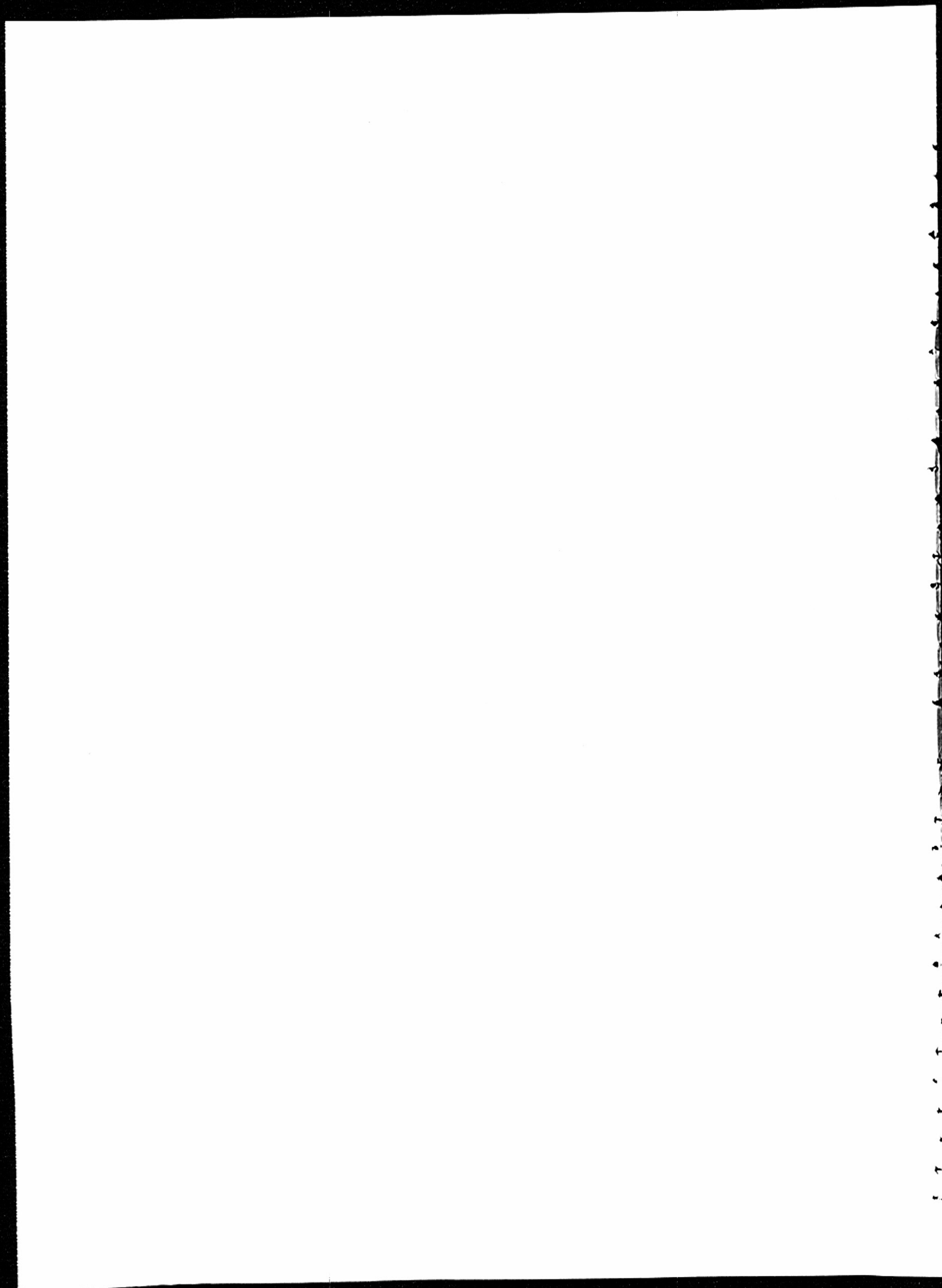
	<u>Page No.</u>
Counterstatement of the Case.	1
Summary of Argument	2
Argument	3
I. Appellant Cannot Recover On A Fire Loss Claim Against Her Fire Insurance Company Where She Has Deprived It Of Its Subrogation Rights Under Its Policy By Fully Releasing A Tort Feasor Against Whom The Subrogation Claim Could Be Asserted	3
II. Appellant Had Full and Complete Control Over The Claim For Damages	4
III. Summary Judgment was Appropriate Since There Was No Dispute As To Any Material Fact	5
Conclusion	6

CASES CITED

<u>Chapman v. Hoage</u> , 296 U.S. 529, 80 L.Ed. 372	3,4
<u>Christiansen v. Gaines</u> , 85 App. D.C., 174 Fed. 2nd 534	5
<u>Harter v. American Eagle Insurance Company</u> , 60 F. 2nd 246	3
<u>Miller v. Miller</u> , 74 App. D.C., 216, 122 F. 2nd 209	5
<u>Minor v. Washington Terminal Company</u> , 86 U.S. App. D.C. 71, 180 F. 2nd 10	5
<u>Newark Fire Insurance Company v. Turk</u> , 6 F. 2nd 533, 43 A.L.R. 498	4
<u>Pacific Fire Insurance Company v. Pennsylvania Sugar Company</u> , 72 F. 2nd 958, Cert. denied; 293 U.S. 623, 79 L.Ed. 710.	3

TEXT BOOKS CITED

<u>Am. Jur</u> , 25 - page 47, Note 5; page 1005, paragraph 1344	4
<u>Barron and Holtzoff</u> , Volume 3, 1231 page 96	5
<u>Corpus Juris</u> , 26 - 459	3
<u>Corpus Juris Secundum</u> , 44 - page 471 Note 5	4



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 14,871

LILA K. MYERS,
Appellant,

v.

THE FIREMEN'S INSURANCE COMPANY OF
WASHINGTON, D. C. (A BODY CORPORATE),
Appellee.

BRIEF FOR APPELLEE

Counterstatement of the Case

Appellant owned a residence in the District of Columbia which she had insured with the appellee insurance company against loss by fire.

On October 15, 1957, a fire occurred in the insured premises caused by the negligence of third-party in cleaning or repairing the oil burner in the appellant's residence. Thereafter, on November 22, 1957, appellant through her agent and adjuster, one GUSTAVE A. LEVENE, filed her sworn proof of loss in the amount of \$1,112.50, with the appellee insurance company for the fire loss covered under her fire insurance policy.

On November 25, 1957, appellee transmitted a subrogation receipt in the above amount to appellant's adjuster for execution by the appellant. Appellant refused to sign the tendered subrogation receipt of the appellee on advice

of counsel, and in lieu thereof offered to execute a subrogation receipt which had been prepared on her behalf for the agreed amount and which authorized appellant's legal representative to collect and withhold the agreed amount of any check, draft or payment given in settlement of any claim against a third party and to retain and forward such proceeds to appellee.

Appellee refused to accept the subrogation receipt which appellant offered to sign because appellee would be unable to control its subrogation claim. On May 22, 1958, appellant filed suit against the tort feisor for \$8,000.00 in Civil Action No. 1321-58, in the Court below.

On April 25, 1958, the plaintiff in this case in the Court below filed suit against appellant for cost of repairs to appellant's property in the amount of \$991.50.

On May 21, 1958, appellant sought and obtained permission of the lower Court to bring in the appellee as third-party defendant in this case.

On June 6, 1958, appellant filed its answer in the Court below, in which it tendered the agreed amount of the fire loss for which it was responsible in the amount of \$1,112.50. A copy of this answer was mailed to appellant's attorney on June 4, 1958, and presumably he received it on June 5, 1958.

On June 7, 1958, appellant executed and delivered to the tort feisor a full and complete release for \$2,612.32 in full pyament of her claim for the fire loss which occurred in her home on October 15, 1957; this being the same claim for which she sought payment from the appellee.

On July 24, 1958, appellant filed its motion for summary judgment which was granted by the trial Court on October 30, 1958.

SUMMARY OF ARGUMENT

1. Since an insurance policy is one of indemnity, a fire insurance policyholder cannot recover against a tort-feisor causing the loss, and as well, against her fire insurer.

ARGUMENT

I.

APPELLANT CANNOT RECOVER ON A FIRE LOSS CLAIM AGAINST HER FIRE INSURANCE COMPANY WHERE SHE HAS DEPRIVED IT OF ITS SUBROGATION RIGHTS UNDER ITS POLICY BY FULLY RELEASING A TORT FEASOR AGAINST WHOM THE SUBROGATION CLAIM COULD BE ASSERTED.

As the holder of a fire insurance policy, appellant knew that she was required to assign to the insurance company its right to recover against a tortfeasor who might be liable for any damage done on which there might be a recovery by the insurance company. (J.A. 19) She even provided a subrogation agreement which her adjuster presented to the appellee but which was unacceptable to the appellee because appellee would be unable to prosecute its own subrogation claim. Instead, appellee's ^{own} subrogation agreement authorized her own counsel to recover on behalf of the appellee. To this arrangement, appellee would not agree. Yet, with knowledge of this requirement by the appellee and after tender by the appellee to the appellant of the agreed amount of \$1,112.50, appellee settled in full with the tortfeasor and thereby eliminated any possible subrogation claim by the appellee. Accordingly, she breached her contract of insurance with the appellee by destroying its right to subrogation and therefore cannot recover against the appellee. Chapman v. Hoage, 293 U.S. 529, 80 L.Ed. 372; Harter v. American Eagle Insurance Company, 60 Fed. (2nd) 246; Pacific Fire Insurance Company v. Pennsylvania Sugar Company, 72 Fed (2nd) 958, Cert. denied 293 U.S. 623, 79 L.Ed. 710.

"It is well settled that if the insured settles with or in any way releases the third person from his liability for the loss, before payment thereof by the insurer, the latter's right to subrogation against such third person is destroyed, and to that extent the insurer is released from liability on the policy." 26 C. Jur. 459.

The record clearly shows that prior to suit the appellee sought to pay appellant's claim without success. Even after suit was filed against it, and prior to the execution of the release to the tortfeasor, appellee tendered the agreed payment to the appellant. (J.A. 8) The release was executed on June 7, 1958. Accordingly, appellee was unable to assign that portion of the claim to which appellee was entitled since she had destroyed that right of subrogation by completely releasing the tortfeasor from his liability. Chapman v. Hoage, supra.

II.

APPELLANT HAD FULL AND COMPLETE CONTROL OVER THE CLAIM FOR DAMAGES

The fire damage which gave rise to appellant's loss was occasioned by the negligence of a third party. By virtue of this, appellant was entitled to make claim for this loss under her fire insurance policy to the extent of the insurer's liability and then, in addition, make claim against the tortfeasor for the remaining damages. In the alternative, she could assert her entire claim against the tortfeasor. This latter action she elected to take. She settled with the tortfeasor not only for the building damage for which the appellee was liable, but for the damage to the contents of the building as well. Having so elected to proceed against the tortfeasor by settling with him and fully releasing him for all claims arising out of the fire loss, she thereby obtained full indemnity for her damage and was not entitled to recover from the appellee as her fire insurer. "A contract of insurance is one of indemnity." 44 C. Jur. Secund., Page 471, Note 5; 25 Am. Jur. Page 47, Note 5; and Page 1005, paragraph 1344; Newark Fire Insurance Company v. Turk, 6 Fed. (2d) 533, A.L.R. 498.

III

SUMMARY JUDGMENT WAS APPROPRIATE SINCE
THERE WAS NO DISPUTE AS TO
ANY MATERIAL FACT

The purpose of the summary judgment rule was to reach the heart of any law suit and dispose of it promptly where there was no dispute as to any material fact, or, if only a question of law is involved. Barron and Holtzoff, Volume 3, 1231, page 96.

There is not dispute as to the following material facts of this case:

1. That a fire loss occurred in appellant's home which was covered by a policy of insurance issued by the appellee to the appellant.
2. That this fire loss was caused by the negligence of a third-party tort feisor.
3. That the appellee tendered payment of its agreed liability to the appellant prior to her settlement with the tort feisor responsible for the fire loss. (J.A. 8)
4. That the appellant settled with the tort feisor after the tender was made to her by the appellee, fully and completely releasing the tort feisor for any and all claims arising out of the fire loss. (J.A. 11)
5. That after full settlement by the appellant with the tort feisor it was impossible for her to assign any portion of her claim to the appellee for purposes of subrogation because of the full and complete release delivered to tort feisor.

With the material facts undisputed in this cause, it then became a question of law for the Court to determine. This the trial Court did by determining that the appellant could not recover twice on one damage claim. Accordingly, she was precluded from recovering against the appellee. Under such circumstances, disposition of this matter was appropriate by summary judgment. See Miller v. Miller, 74 App. D.C., 216 122 Fed. (2nd) 209; Christiansen v. Gaines, 85 App. D.C., 174 Fed. (2nd) 534; Minor v. Washington Terminal Company, 86 U.S. App. D.C. 71, 180 Fed. (2nd) 10.

The record clearly shows that prior to suit the appellee sought to pay appellant's claim without success. Even after suit was filed against it, and prior to the execution of the release to the tort feisor, appellee tendered the agreed payment to the appellant. (J.A. 8) The release was executed on June 7, 1958. Accordingly, appellee was unable to assign that portion of the claim to which appellee was entitled since she had destroyed that right of subrogation by completely releasing the tort feisor from his liability. Chapman v. Hoage, supra.

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CONCLUSION

Appellee respectfully submits to this Court that the judgment of the trial Court below was correct in all respects and its judgment should be **AFFIRMED.**

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By

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